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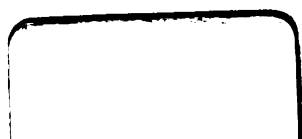
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THE
MINING REPORTS.

A SERIES CONTAINING THE CASES ON THE

LAW OF MINES

FOUND IN THE AMERICAN AND ENGLISH REPORTS, ARRANGED
ALPHABETICALLY BY SUBJECTS,

WITH NOTES AND REFERENCES.

By R. S. ~~MORRISON~~,
OF THE COLORADO BAR.

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MINING REPORTS.

VOL. VI.

LORD ABINGER v. ASHTON.

(L. R. 17 Equity, 353; 9 Moak's Eng. R., 585. High Court of Chancery, 1872.)

- ¹ **Specific performance as to mode of working.** The matter of a lease, covenanting for the working of a series of underlying beds of coal, *held*, (*obiter*) not a matter for specific performance.
- ² **Facts of the case—Covenants as to working three successive underlying coal seams.** Three seams of coal, one underlying another, were let at a fixed rent, under covenants that lessees should work and carry on the mines with their utmost skill and ability in the best and most effectual manner, to the best advantage and according to the common mode and usual practice of carrying on collieries with effect. Upon bill by the lessor alleging that defendants after having for some time worked the three mines had ceased working the *upper* mine, and also that they were working the *lower* in advance of the *middle* vein and praying injunctions accordingly, *held*, that under the terms of the covenant defendants were entitled to work any of the mines without working all, or all that they had commenced to work; that under the evidence it was the common practice in the district, to work a lower seam of coal before working a higher.
- Working as affected by the safety statutes.** The court ought not to interfere to enforce a working where such action must be in disregard of the statutes relating to ventilation and the safety of the deep miners.
- Testimony of experts analyzed.** An expert knows that he can not be indicted for perjury because his testimony is matter of opinion; he is employed in the sense of gain by the person who calls him, and he is selected according as his opinion is known to incline.

This was a suit by the owners of an estate in *Dukinfield* and *Newton*, in the county of *Chester*, under which certain coal mines were situated, against the lessees of the said mines to restrain them from further digging any coal or carrying on any workings in one of the mines, called the *Cannel Mine*, until

¹ *Booth v. Pollard*, 4 Y. & C. 61. ² *Stone v. Bumpu.*, 4 M. R. 278.

they had carried on the workings in another mine, called the *Black Mine* to the same point to which the working of the first named mine had been extended and also restrain them from working the *Black* and *Cannel Mines*—without working the *Town Lane Mine*.

The mines or beds of coal and cannel in question in the suit consisted, besides many others which had never been worked, of the *Town Lane Mine*, which was the uppermost, the *Black Mine*, which was the next, and the *Cannel Mine*, which was the lowest of the three which had been worked.

Before the date of this lease to the defendants, the lessor, Francis Astley, had sunk a pit called *Astley's New Pit*, and by means of it had gotten portions of the *Town Lane Mine*, and had begun to work it; he had also driven out roads and airways, or airgates, from the pit on the north and south sides to the boundary of the *Town Lane Mine*, and had worked back from that furthest extremity on the north side, and gotten the *Town Lane Mine* or seam of coal, working backward on the north side, and was preparing to work on the south side and had also placed machinery in the pit for the purpose of working it.

By the lease of the 15th of November, 1856, made between Francis Astley of the one part, and the defendants of the other part, Astley demised to the lessees "all such parts and portions, or so much and such part of all those several mines, delphs, veins, and beds of coal and cannel lying and being under the lands and grounds of Francis Astley as were not then leased, and called the *Black Mine*, the *Town Lane Mine* and the *Peacock Mine*, and all other mines of coal and cannel lying between the *Great* and *Roger Mines*, and the *Peacock Mine*, with certain exceptions; and also the pit called '*Astley's New Pit*,' with its steam engines and buildings, and all the machinery therein mentioned, with the power to get the same mines, and to make and sink any pits, and drive any tunnels or trenches, and to make any canals, water-courses, and fences, and to set up any engines or machinery therein mentioned. To hold the demised premises for twenty-three years at the rents and quarterages thereafter mentioned in particular for the pit called *Astley's New Pit*, in addition to the quarterages, the yearly rent of £3,000,

payable quarterly, the first payment to be a quarter after the lessees should, by sinking *Astley's New Pit* 300 yards below the present depth, pursuant to a covenant for that purpose thereinafter contained, had arrived at the mine of coal called the *Black Mine*, and until that time £250 only quarterly."

The lease also contained provisions for working the mines, for using the roads for the purpose of carting away the produce of the mines, and also a covenant by the lessees "that they shall and will at all times during the term, work, use, manage and carry on the said mines thereby demised with their utmost care and ability, and with a competent number of workmen, and in the best and most effectual manner, to the best advantage, and according to the common mode and usual practice of carrying on all coal works or collieries with effect, and according to the true intent and meaning of these presents; and that no coal or cannel coal shall be riddled at the bottom of the coal pits, or either or any of them, but that all the coal, cannel and slack, shall be gotten or brought up from the said mines; the coal and cannel hereby demised, and each and every of them shall be free and honestly gotten or brought up out of all the coal pits then open, or that shall be made or sunk by virtue of such lease to the ground above in order to be freely and properly sold."

The defendants sunk the pit called *Astley's New Pit*, so as to reach the mine called the *Black Mine*, which they commenced working in 1858.

In 1862 the defendants carried tunnels from *Astley's New Pit*, lower than the *Black Mine*, down into the mine or seam of coal called the *Cannel Mine*, which was said to produce coal of a better quality and commanding a higher price than that produced from the *Town Lane Mine* and the *Black Mine*. They subsequently, under a new agreement, sunk a second shaft, which was used as the upcast shaft for ventilation, and was also used until the accident hereinafter stated, for the purpose of working the *Town Lane Mine*, the two lower mines being worked through the *Astley's New Pit*. In the beginning of 1870 an accident occurred in the *Dunkirk Colliery* of the defendants, by which several lives were lost, which caused attention to be directed to the ventilation of the mine.

In September, 1870, the plaintiffs, the trustees under the will of Francis Astley, who died in 1866, caused a written requisition to be sent to the defendants, requiring them to work in a proper and workmanlike manner the coal called the *Town Lane Mine*, and to keep open and in proper condition all the airways and roads in the same mine, pursuant to the provisions in the said lease.

The plaintiffs alleged that the defendants, for some time after working the *Town Lane Mine*, in the manner commenced by the said Francis Astley, at the extremity of the mine and of the roads and airways commenced by Astley, worked the same mine on the south side from near the mouthing of the mine into the air or upcast pit, by means of scaffolding, cages and machinery, and worked this without having proper pillars on each side of the roads and airways as far as they worked, and so choking up the roads and airways beyond the workings as made by Astley, and left by him at the commencement of the lease; that the defendants afterward improperly worked the *Town Lane Mine*, and worked it only a few hundred yards from the mouthing, and shut up the airways and roads in the said mine, and left a large block of the *Town Lane Mine* unworked and ungotten, and had allowed the levels and air-gates and water levels in the same mine to become choked and out of repair.

The plaintiffs further alleged that the defendants were working the *Black Mine* and *Cannel Mine* without working the *Town Lane Mine*, whereas they were bound to continue the workings of each of the three mines after they had commenced them until each mine was exhausted, and to work the block of the *Town Lane Mine* which they had left unworked; that the defendants had lately ceased to work the *Town Lane Mine* and had taken away the scaffolding and machinery placed by them on the demised premises for working that mine, and had done so without regard to the covenants in the lease and the practice of good mining, under the pretext that they could not otherwise comply with the provisions of the act for the regulation of mines: 23 and 24 Vict. c. 151, s. 10, R. 1, which related to ventilation.

The plaintiffs further alleged that the defendants were working the *Cannel Mine* to the detriment of the *Town*

Lane Mine and the *Black Mine*; that the *Cannel Mine* was only fifty yards below the *Black Mine*; and that, having regard to the nature of the coal measures, the defendants ought, by the rules of good mining and according to the covenants in the lease, not to work the *Cannel Mine* beyond and in advance of the workings of the *Black Mine*, but that they had worked, and were continuing to work, the *Cannel Mine* in advance of the workings of the *Black Mine*.

The bill prayed, first, that it might be declared that the defendants were bound under their lease not to work the *Cannel Mine*, and that they might be restrained by injunction from further digging any coal or carrying any workings in the *Cannel Mine* until they had carried on their workings in the *Black Mine* to the same point to which they had extended their workings in the *Cannel Mine*, and from working the *Cannel Mine* to a point beyond their workings of the *Black Mine*; secondly, that the defendants might be restrained from allowing the roads and airways in the *Town Lane Mine* to remain choked up, or otherwise than open and in proper working order, and from continuing the removal of the machinery, scaffolding and cages for working the *Town Lane Mine*; thirdly, that it might be declared that the defendants were bound to continue to work the *Town Lane Mine* in a proper manner, and might be restrained from working or getting out coal from the *Black Mine* and *Cannel Mine*, or from the *Dunkirk Colliery* without continuing to work the *Town Lane Mine* in a proper manner and according to the covenants in the lease; fourthly, that the defendants might be ordered, in addition to or substitution for, any portion of the relief prayed, to pay to the plaintiffs such damages as the court should direct, and for consequential relief.

The defendants, by their answer, submitted that working the said mines in the manner they had done was justified by the circumstances of the case; and that it was not to the prejudice of the other mines comprised in the lease, and was consistent with the covenants in the lease, and was in accordance with the rules of good mining.

The defendants stated that, after the accident before referred to, the government inspector pronounced the ventilation inadequate, and gave his opinion that with the mode of

working then practiced, namely, raising the coal from the upper mine through the upcast shaft, the ventilation was inadequate for safety, and suggested that the upcast shaft or *Town Lane Pit* should be devoted exclusively to the purposes of ventilation, for which alone it had been originally sunk. They stated that they then caused a minute inspection of the colliery to be made by Mr. Cross and Mr. Higson, two eminent mining engineers, who made a report on the 21st of September, 1870, as to the causes of the defective ventilation of the colliery, and after recommending the removal of a scaffold at the *Town Lane Mine*, they continued thus: "We are of opinion that the *Lower Mine* can not be sufficiently and safely ventilated so long as the *Town Lane* is being worked; and as it appears that the protection of life is an equal protection of property, we advise you to abandon the *Town Lane Mine*, and work with increased energy the *Black* and *Cannel Mines*, and thereby avoid the present excessive risk, at the same time that you will secure a better result for all parties concerned."

The defendants stated that the *Cannel Mine* was about fifty yards only below the *Black Mine*; that they were advised by competent authorities that they ought not, by the rules of good mining, or according to the covenants in the lease, to abstain from working the *Cannel Mine* to a point below and in advance of the workings in the *Black Mine*.

The defendants submitted that they ought to allow the roads and airways in the *Town Lane Mine* to remain as at present; and that they were working the *Black Mine* and *Cannel Mine* in the only proper manner, which was to work them without working the *Town Lane Mine*.

There was considerable amount of evidence on both sides. The following were some of the most material passages in the plaintiff's evidence:

ISAAC WHEELDON, a mining agent in *Cheshire*, stated that "the common mode and usual practice of carrying on coal works of this character was, when the seams were not separated by a very great interval to work the same together, or to work the upper seam in advance of the seam which was next below it, and not to work such lower seam in advance of such upper seam."

THOMAS LIVESEY, mining engineer, deposed as follows:

"The working of one mine under another has the effect of breaking the strata between the two mines, and the *Black Mine* being only fifty yards or thereabouts above the *Cannel Mine*, this would be likely to take place, and thus injure the *Black Mine* both as to the facility of working afterwards, and also as to the quality of coal, thereby doing an injury to the lessor."

ISAAC WHEELDON, in a further affidavit, said: "The allegation in the defendants' answer to the effect that it was well known that no one would take a lease of collieries with a restriction requiring the mines to be worked successively from above downwards, does not accurately represent the practice of good mining as understood by competent engineers; the contrary is in many instances true, for in *Derbyshire* it will be found that lessees are absolutely restricted by their leases from working lower mines in advance of those above them. When the distance between mines is considerable, a lower mine may be worked in advance of an upper without so much injury to the latter as where the distance is small; but under any circumstances the best and most approved method of working is from above downwards."

The defendants' witnesses stated that it was the usual practice in the district to work a lower seam of coal in advance of an upper seam, when it was commercially desirable to do so. They mentioned specifically several instances where it had been done in *South Lancashire* and *Cheshire*, and said that they considered it the best practice in mining, for though it might damage the roads, that would only be an injury to the lessee of the mine, who would be bound to repair them, but that as regarded the mine itself, it would improve the upper mine and increase the coal to the extent of 50 per cent. The following were some of the material parts of the evidence:

WILLIAM BRYHAM, mining engineer and colliery proprietor, deposed: That he had had considerable experience in working the cannel and other seams of coal in the *Wigan* district, and had to a large extent worked the cannel seam in advance of the superincumbent seams without any injury or detriment to the latter: that he was at present working the *Wigan* five-feet and the *Wigan* four-feet seams extensively over an area

of about 200 acres from which the cannel and King coal seams had been recently exhausted. The two latter seams averaging in thickness about four feet nine inches, and lying at the respective distances of 120 yards and 144 yards above the cannel seam; that he was convinced from experience that they had not in the least suffered, and the seams were equally as productive and as economically worked as when the cannel was ungotten; that *Wigan* district was the real cannel district; that in all that district the great bulk of the cannel was worked out long before the coal; that he had many cannel mines under his management; that in every case he had gone on working the cannel first, irrespective of the upper seams; that in the *Wigan* district there was ninety yards distance between cannel and upper seams, but it was not an uncommon practice to work out a lower seam when only twenty or twenty-five yards intervened; that in his experience no material damage had ever arisen; that something depended on the thickness of the seams; working a thin seam like the cannel seam in the *Astley Pit*, two feet three inches, could not, in his opinion, cause damage to the upper mine; and that it was a common custom to work the best seams first, irrespective of position, unless where the lease specified; he considered it to be in accordance with the rules of good mining to work in that mode.

ALFRED HEWLETT, colliery proprietor and mining engineer, deposed: That he was largely engaged in the management and conduct of collieries and iron works, and had been so for the last twenty-seven years—in fact from his boyhood; that he was a fellow of the *Geological Society of London*, and president of the *Mining Association of Great Britain*, and was the managing director of the *Wigan Coal and Iron Company, limited*, whose collieries were about the most extensive in the kingdom, employing about 10,000 hands, and raising about 2,000,000 tons of coal per annum; that he also had very considerable experience in the system of working mines in almost all the districts in the kingdom; that the workings of the *Wigan Coal and Iron Company, limited*, extended over several thousands of acres of mining ground held under lease from a great number of land owners, and were situate in no less than thirteen different townships in and about *Wigan*;

that it was entirely unusual, and contrary to the common practice of mining in that district, to compel a lessee to work or pay for an upper mine in quantity equal to that which might be gotten in the subjacent mine; that such a covenant did not exist in the leases granted to the *Wigan Coal and Iron Company, limited*, and, in his judgment, such a covenant would not be conducive to good mining, nor would it be either in the interests of the lessor or the lessee; and that he considered the obligation attempted to be enforced upon the lessees (the defendants in this suit) to be contrary to the usual custom of fair workman-like and skillful mining, and to be entirely unusual in mining operations, and contrary to the true interests of either party.

THOMAS WYNNE, her majesty's government inspector of mines for the districts of *North Staffordshire, Cheshire and Shropshire*, deposed: That no alteration in the scaffolding or cages of the *Town Lane Mine* would suffice to enable it to be safely worked concurrently with the other mines from the present shaft, and there was no plan left but sinking a separate shaft.

JACOB HIGSON, mining engineer, deposed: That he was acquainted with the workings of collieries in *Lancashire and Yorkshire, Warwickshire, North Wales and South Wales*, in which districts he was actively engaged in the management; that he was well acquainted with all mining districts in *England* besides; that he was a member of the *Institute of Mining Engineers (Midland and South Midland)*, and also the *North of England Institute of Mining and Mechanical Engineers*, and also consulting engineer to some of the largest collieries in *England*; that he entirely dissented from the opinions expressed in the affidavits filed by the plaintiffs in this matter as to the question of working the *Cannel Mine* in advance of the *Black Mine*; that, in his opinion, the defendants ought not, by the rules of good mining, to cease working the *Cannel* in advance of the *Black*, and he denied that by so working, the mine was prejudiced in any way, and he did not know a case where a lessee was compelled to work two seams concurrently, or prevented working the *Cannel* or any other mine in advance, unless where he was positively restricted by the covenants in the lease, and in the absence of

such covenants there was no such rule of good mining applicable to all cases as had been suggested on the part of the plaintiffs; that commerce in that district had invariably regulated the working of the mines, and in most of the instances where lower mines had been worked in advance, it had arisen from the fact that coals from these mines were salable at that particular time at a higher price than they might have been if the mine had been worked in strict rotation.

There was also specific evidence on the cross-examination of the defendants' witnesses to the effect that, in these and many other mines, working a lower seam in advance improved the working of an upper seam by loosening the strata, relieving the pressure, and so causing a much larger proportion of coal to come out in large blocks, and diminishing the proportion of slack, and that any countervailing injury could always be prevented by leaving a sufficient interval of time between the workings.

In reply to these affidavits, the plaintiffs brought forward several witnesses, one of whom, *John Brown*, a mining engineer in *Staffordshire*, made the following statement:

"With regard to the working of the *Cannel Mine* before the *Black Mine*, I believe there are some cases where, at a less depth from the surface than that in question, the working of an underlying may not damage an overlying mine, but, on the contrary, render its working more advantageous, that is, where no workings have been made, or headings or levels driven, in the overlying mine; but my experience shows that where headings have been made and pillars of coal left, or workings of any kind made in the overlying seam, any working out of underlying coal, being within fifty yards, or even more, will damage the roads in the upper seam and materially affect the pillars, so that when they are worked out great waste must ensue by the crushing of such pillars; and I believe that by working out the *Cannel Mine* under the roads and pillars in the *Black Mine*, the produce of such pillars will be less valuable than if no workings had been made below; and I consider that the defendants ought to be restrained from continuing such workings."

WILLIAM SEDDON, a *Lancashire* colliery manager, deposed:

"I very much disapprove of working the *Cannel Mine*, in

advance of the *Black Mine*, as I am confident that it would injure the *Black Mine*. When the *Cannel Mine* is worked, first, and the subsidence of the whole strata takes place, the shale lying next to the *Black Mine* coal being of a tender nature, breaks up into small particles and mixes with the crushed coal, which augments the cost of working and depreciates the coal value. I think the proper way of working these two mines is the working of the *Black Mine* in advance of the *Cannel Mine*, and that, I am confident, would be the most judicious way of dealing with the matter, and would most assuredly conduce to the benefit both of the lessors and lessees."

WILLIAM BLACKBUENE, mining engineer, deposed thus:

"The *Cannel Mine* ought not to be gotten in advance of the *Black Mine*, and it is contrary to the usual mining custom in this district to work the lower seams before the upper beds of coal had been removed, unless it is intended to allow the *Black Mine* to remain ungotten for a period of not less than two or three years after getting the *Cannel Mine*. I say the quantity of house fire coal produced in this *Black Mine* will be decreased, and the levels and airways in the same mine damaged."

ROBERT WINSTANLEY, mining engineer, deposed as follows: "The usual practice and best mode of working mines of coal is to work the higher seams in advance of the lower, especially in the district in which the *Astley* deep pit is situate."

Mr. FRY, Q. C., and Mr. BATTEN, for the plaintiff.

The plaintiff in this case is entitled to a mandatory injunction to restrain the defendants from interfering with the fulfillment of this engagement.

The court has in various cases exercised a similar jurisdiction: *Lane v. Newdigate*, 10 Ves. 192; *Storer v. Great Western Railway Company*, 2 Y. & C. Ch. 48; *Duke of Beaufort v. Morris*, 6 Hare, 340, 342, where an order of Lord Eldon's in *Morris v. Smith* is referred to; *Wilson v. Furness Railway Company*, Law Rep. 9 Eq. 28. In this case, even if specific performance of the covenant could not be enforced, we submit that the plaintiffs are entitled to an injunction.

By the terms of the covenant in the lease they are bound to work and carry on the mines with the utmost care and ability, and in the best and most effectual manner, to the best advantage, and according to the common mode and usual practice of carrying on all coal works and collieries with effect. There is no separate demise of each vein; they are demised as an entirety, and therefore the covenant obliges the defendants to work the several veins as a whole, and not to work one vein separately to the injury of another. One vein or mine can not, according to this covenant, be worked before another, so as to leave another unworked or ungotten, and if a vein is once begun to be worked the works must be continued.

The evidence adduced on behalf of the plaintiffs is conclusive as to the custom of the country, showing that the proper course of mining in that part of the country where the seams are not separated by a very great interval is to work the same together, or to work the upper seam in advance of the seam which is next below it, and not to work the lower seam in advance of the upper seam. The defendants' evidence, including the report of the mining engineers, Messrs. Higson and Cross, can not be relied on.

According to the evidence, it is contrary to the practice of this district for the defendants to work the *Black Mine* and the *Cannel Mine* without working the *Town Lane Mine*. The pretext that the mode of working adopted by the defendants was necessary for the safety of the mine, can not be established. They have no right to remove the machinery for working the *Town Lane Mine*, or to allow the roads or airways in the *Town Lane Mine* to remain choked up.

On the whole case, we submit that the plaintiffs have established a good ground for the interference of the court.

Sir R. BAGGALLAY, Q. C., and Mr. HEMMING, for the defendants, were not called on.

Sir G. JESSEL, M. R.

The case has been very elaborately argued. I look on this bill as a mere experiment by an experienced equity draftsman, who was perfectly aware from the first that the kind of agreement in this lease as to working the mines was not the sort of agreement of which the court, according to the limits im-

posed by the authorities on its jurisdiction, could give specific performance; and, being well aware of that, he exercised his ingenuity to see if he could not, by means of an injunction, obtain what in reality was equivalent to specific performance. I repeat, the bill does very considerable credit to Mr. Batten, if he will allow me to say so, and to his ingenuity. But unfortunately it fails in substance the moment you admit you can not get specific performance, as you must here.

By a lease granted in November, 1856, Mr. Astley demised certain mines, together with a pit and depot, in words which are not immaterial; they were as follows: "All such parts and portions, or so much and such parts of all those several mines, delphs, veins and beds of coal and cannel lying and being under the lands and grounds of F. Astley and G. J. Newton, or either of them, as were not then leased, and called the *Black Mine*, the *Town Lane Mine*, and the *Peacock Mine*, with certain exceptions therein mentioned." The word "mine" is clearly there used in its primary sense of "vein," and each mine is named separately.

Then there is a demise of the pit called "*Astley's New Pit*," and also, by way of demise and not of exception, with its steam engines, engine houses, work shops and other buildings.

[His Honor then referred to other provisions of the lease before the covenant as to working the mines, observing that, if the lease stopped there, the lessees would have the power, but not an obligation cast upon them, to work any of the demised mines, or none of them if they thought fit. He then referred to a covenant to sink the Astley pit to the depth of 300 yards lower than its depth at the time of the lease, and then read the covenant upon which the decision in the case mainly turned.]

The first question which I have to decide is, what does this covenant mean? At the outset we find the plaintiffs coming into this court to ask the court to give effect to a covenant, and being compelled to say it can not mean what it says. The literal meaning is as absurd as possible, and therefore I must try to find a secondary meaning.

If ever there was a case for an injunction, as distinct from the remedy at law, I suppose it must be founded on a clear contract between the parties; and certainly the plaintiffs, who come here with such an admission as this, have not a very

clear contract. Let us see if the plaintiffs can have the benefit of the literal construction. In the first place, are the lessees to work all the mines at all times during the term? That is impossible, for these reasons: First, they could not work the *Town Lane Mine* while they were sinking the other. The pit was wanted for the purpose of being used for the workmen who were going further down, and for a very considerable time that must be so. In the next place, it is impossible to work the other mines until you get at them; and the very lease, on the face of it, shows you can not get at them, without sinking a pit; and though all parties must have known that with a pit of this size it was impossible to work all these mines, they do not seem to take that into account, but insist on the working of the *Town Lane Mine*.

For these reasons it is manifestly impossible to adopt the literal reading. But there is another reading, and that is this: that the covenant to work the mines at all times in an effectual manner would compel the lessees to work, although they found faults which might render it excessively expensive to work, and which it is very unusual to call upon a lessee to work through; and it would also compel them to work a vein at a loss, although that would be to work all the mines at a loss. And this would be particularly so if they were compelled to work the upper vein and *Peacock's Mine*; they might also be obliged to work other seams which are quite unworkable at a profit. But it does not stop there, because that would compel them to go on working after the coal had deteriorated in value, and could not be sent to market at a profit. It would be a most unreasonable and absurd covenant. I am not surprised, looking at it that way, that the counsel for the plaintiffs felt themselves compelled to abandon the literal reading. Then they had to suggest some other reading, and what they suggested was this, that if you begin to work a vein you must continue to work it; but I must say I can not find in the covenant any arrangement of that sort, and if that were so, I do not know what it would lead to. It is mere conjecture. But, independently of the several reasons I have mentioned, others would apply to that reading as well. For instance, the *Town Lane Mine* was not at work—but for the reasons I have mentioned it could not continue work "

during the sinking of the pit, and therefore the covenant could not be held to apply to that; and it appears to me that I am not at liberty to use this covenant as a covenant for continuous working at all, though it might apply to this, that when you do work you shall work in the right way.

But suppose this difficulty removed, the plaintiffs ask for an injunction on this point to restrain the working of the other colliery, while the one which the defendants have begun to work remains unworked.

It appears to me that that has no connection whatever with the covenant. There is no covenant not to work any unless you work all, which is what the plaintiffs want. The only covenant they have is to work all, but the right to work any is under the demise. The lessees have a right, under the previous words, to work any of the mines. You must find a restrictive covenant to cut down the legal effect of the demise, and there is none.

A demise of twenty houses, with a covenant to keep all of them in repair, does not prevent the lessee repairing all but one; it adds, no doubt, an additional obligation on him; but could the lessor apply to the court to restrain him from repairing nineteen of them until he repaired the twentieth? Is there any difference between that case and this?

It was said when I put this in argument, that there was a connection between the mines here, there being a common pit. But in the case of a single house, with a common staircase and series of flats, and a covenant to repair, could you say that because the tenant was repairing the roof and not the ground floor, that you could apply to the court of chancery for an injunction against him for not repairing the roof until he had repaired the ground floor? It is the same thing here. This is not an affirmative covenant which includes a negative. There is a judgment of Lord HATHERLEY, when Vice-Chancellor, in the well known case of *Pollard v. Clayton*, 1 K. & J. 462, which bears on this point.

Whilst I am upon this covenant I may mention something about another point. It was said that there was a vein called the *Cannel Mine*, which ought not to be worked in advance of the *Black Mine*. But when you come to look at it, in reality, the complaint is, not that you work the *Cannel*

Mine in advance, but that you do not work the *Black Mine* fast enough. What is said in effect is, that if the defendants had worked the *Black Mine* as fast as the *Cannel Mine* the plaintiffs would have been content; but of course they can not get specific performance of that. They therefore ask to stop the defendants from working the *Cannel Mine* till the *Black Mine* is worked up to it.

Not being able to compel the working, they seek by the form of an injunction to stop the working of another mine—the *Cannel*—which the defendants have a perfect right to work.

It appears to me, looking at the covenants, that I can not grant the injunction which the plaintiffs ask. I might well stop there, but I do not think it would be quite satisfactory, because a great deal of evidence has been gone into as to the facts, and it is necessary I should advert to this in order to make the case intelligible. The first complaint, as I have said before, is, that the *Town Lane Mine* has been shut up. Now, if I am right in what I have said, the plaintiffs can not get any injunction to compel the defendants to shut up the *Cannel Mine* till the other is worked.

But there is another ground alleged by the defendants, which is admitted by the plaintiffs to be an insuperable difficulty if it is true in fact. The defendants say it is impossible, with a pit of the present size, having regard to the requirements now made by the legislature with regard to the safety of the workmen in deep mines, to work the *Town Lane Mine* because there would not be sufficient ventilation. If that is so, even the plaintiffs admit the court ought not to interfere by injunction.

In March, 1870, there was a frightful explosion in this mine, and many men were killed. The government inspector interfered, and he said in effect: "Your pit is not large enough; the upcast shaft through the *Town Lane Mine* is not large enough to work the *Town Lane Mine*, and to ventilate the other; upon considering the whole matter, I am of opinion the best thing to be done is to shut up the *Town Lane Mine*, and go on with the other veins."

This seems to have been unpalatable advice to the defendants, and they did not immediately act on it, but they called in two other engineers—Mr. Higson and Mr. Cross—to

advise what was best to be done; and in September, 1870, Messrs. Higson and Cross made a report, which report puts it very strongly in the same way as did the government inspector. [His Honor then read the report.]

It is suggested by the plaintiffs that this evidence is not to be depended on, and that their witness's evidence is. If the defendants' evidence is the correct version, the effect of an injunction would be to shut up all the mines, and leave the defendants subject to a dead rent.

Now, I will consider the evidence on this point, but before doing so, I must say how the plaintiffs contest it. They contest it by producing the evidence of some experts, whose evidence was met by at least as many experts on the part of the defendants. As to this, I may say what, I think, I have often said before, that in matters of opinion I very much distrust expert evidence, for several reasons. In the first place, although the evidence is given upon oath, in point of fact the person knows he can not be indicted for perjury, because it is only evidence as to a matter of opinion; so that you have not the authority of legal sanction. A dishonest man, knowing he could not be punished, might be inclined to indulge in extravagant assertions on an occasion that required it. But that is not all. Expert evidence of this kind is evidence of persons who sometimes live by their business, but in all cases are remunerated for their evidence. An expert is not like an ordinary witness, who hopes to get his expenses, but he is employed and paid in the sense of gain, being employed by the person who calls him.

Now, it is natural that his mind, however honest he may be, should be biased in favor of the person employing him, and accordingly we do find such bias. I have known the same thing apply to other professional men, and have warned young counsel against that bias in advising on an ordinary case. Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual, that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them.

Accordingly, we find in doubtful cases the most remarkable

results. Take this case; there are two questions: one, whether sufficient ventilation exists for three mines; the other, whether the *Cannel Mine* ought or ought not to be worked in advance of the *Black Mine*.

Well, we have the witnesses giving evidence for the plaintiffs' view of the matter, or the defendants' view, according as they are sought out and paid by each. It is very natural, and just what one would expect, but it leads one to distrust their evidence. There is also this to be said against them, namely, that their evidence is not the evidence of fair professional opinion. The men are selected according as their opinion is known to incline.

Suppose a person wants to sell a house, and as he wants a very high value put upon it, he sends to ten valuers, and out of those he selects the three who have put the highest value on the house. The purchaser wants a very low value, and selects out of a number of valuers three of the lowest; each set of valuers values high or low, according to the requirements of the person who employs them. I have known the same sort of thing done even as regards medical evidence. The consequence is, you do not get fair professional opinion, but an exceptional opinion by evidence selected in this way.

That being so, when I have expert evidence I am, as I said before, very distrustful *a priori*; and I am anxious to ascertain the character of the experts, and to see the position they occupy.

In this case I have this circumstance, that of the five experts for the plaintiffs, four are ordinary experts; the fifth is an agent for the plaintiffs and in their regular employment, and that being more continuous, his bias would be rather greater. When I look to the defendants' witnesses, three of them are of a very different character. The first, Wynne, is not in the ordinary sense an expert witness at all. He is the government inspector of mines, and was not paid for this purpose. The advice he gave was given in the course of his employment as government inspector, and with a view to the safety of the mine. It was given before there was any dispute. The advice he gave was given long ago, and it was advice upon which the defendants were not willing in the first instance to act. As regards Higson and Cross, although not of such good position as Wynne in these re-

spects, they are in a better position than ordinary experts. They were called in to advise the defendants before any contest arose. Their opinion was given in the shape of a formal report, and not with a view to the success of the suit. They are parties interested, in the sense of acting for the defendants, to assist them in giving *bona fide* advice for the more advantageous conduct of the mine, but not to assist them in the litigation. Therefore I look upon their evidence as much better and more to be depended on than ordinary expert evidence.

If, therefore, the witnesses were all equally positive, I certainly should prefer the evidence of the defendants; but when I come to examine the plaintiffs' evidence, I find the evidence is not nearly so positive as that of the defendants. As regards this matter of the ventilation, the majority of the witnesses say there would be sufficient air if the passages in the lower mines, especially the *Black Mine*, were constructed on a larger scale.

On the whole I am satisfied, on the balance of testimony, that the defendants are right on this point, and that it would be dangerous to continue the working of the *Town Lane Mine*, together with the *Black Mine* and the *Cannel Mine*. Therefore I ought not to interfere by injunction, and on this point the plaintiffs' case fails.

The next point taken was that plaintiffs were entitled to an injunction to prevent the *Town Lane Mine* "remaining choked up, or otherwise than open and in proper working order."

Now the jurisdiction of this court does not extend to the performance of covenants to repair. It is clear I can not grant an injunction that the defendants shall not be at liberty to work the other mine till they put the *Town Lane Mine* in repair.

The other part of the case that was seriously fought was this: It appears that about some fifty yards below the *Black Mine* there is a vein of coal of about 2 ft. 3 in. in thickness, which is a very profitable mine to work at the present time, and the defendants are working it, as it is termed, in advance of the *Black Mine*.

One of the witnesses says they took 11,000 tons a week out of the *Cannel Mine*, and only 600 tons out of the *Black Mine*, so that it would appear that the *Cannel* coal is worked more rapidly than the *Black Mine* coal, and that the *Cannel*

Mine has been almost exhausted, whilst the *Black Mine* is very little worked; and the allegation is, that this is contrary to good mining. An admission was made that it was not contrary to good mining to work a coal mine as they are working the *Cannel*, provided they did not work the *Black Mine* at all; but that concedes the whole case, if I am right in the construction I put upon the covenants, that if they are entitled to work the *Cannel Mine* alone, they are not the less entitled to work it because they work the *Black Mine*. If they work it without working the *Black Mine* they may equally work it if they do work the *Black Mine*.

But it is said, if you work the *Black Mine* at the same time as the *Cannel Mine*, the roads and passages of the *Black Mine* will be injured by reason of the taking away of this additional quantity of material, which will cause a subsidence and injury to the roads.

That may be so, but still that does not give a right to injunction.

The injury done is an injury done to the working of the *Black Mine*. Either you are working the *Black Mine* properly, or you are not; but whether so or not, for that is the point, the plaintiffs admit if you work the *Black Mine* fast enough no injury will happen; or rather their complaint is that the *Black Mine* is worked improperly by not being worked away fast enough.

Suppose it was a negative instead of an affirmative injunction that was asked. You could not ask for an injunction to restrain them from working the *Cannel Mine*, and on that ground the plaintiffs must fail. As regards the *Black Mine* you can not have an injunction for not working fast enough. There is no form of injunction applicable to it, and therefore the remedy by injunction is simply out of the question.

But passing from that, let us just look a little at the fact. Now the fact in dispute and the issue to be decided is this: Whether working the two mines or seams together, but working the lower mine in advance, is in accordance with the common mode and usual practice of carrying on coal works or collieries with effect, which refers, of course, to that district; because, with regard to usual practice, we know that it varies very much with the nature of the mine and the nature

of the fuel which is extracted; the practice of one district has little or no application to the practice of another. Now, on this there has been a great deal of evidence, and I must say that the evidence is overwhelming in favor of the defendants, and that is evidence not merely of opinion but of fact. [His Honor then reviewed the evidence of the plaintiffs' witnesses and the evidence of the defendants' witnesses, and said that while one set of witnesses were vague and unsatisfactory the other gave conclusive evidence, founded on specific facts, in favor of the defendants' mode of working the mines, and continued.]

The result is, that it is proved that the mode of working adopted by the defendants, whether the best possible mode I do not say, is the common mode and usual practice, and consequently there is no ground for accusing them of a breach of contract, or of doing anything which entitles the plaintiffs to come to this court for an injunction.

The bill must be dismissed with costs.

1. Experts referred to as advocates of the theory of the party calling upon them, with suggestion that they ought to be selected by the court: *Grigsby v. Clear Lake Co.*, 40 Cal. 396.

2. Evidence of experts necessary but not the safest testimony: *Kahn v. Old T. Co.*, 2 Utah, 174; *Post* PATENT.

3. Knowledge requisite to prove value of land: *Hanover Co. v. Ashland Co.*, 84 Pa. St. 279; *Post* MEASURE OF DAMAGES; *Brown v. Corey*, 5 M. R. 368.

4. Whether a witness offered as an expert is qualified as such is a preliminary question for the court to decide: *Fairbank v. Hughson*, 58 Cal. 314; *Jones v. Tucker*, 41 N. H. 546.

5. Men who have made the subject-matter of inquiry the object of special study, it being first shown that they have superior knowledge upon the subject, may give their opinions in evidence: *Page v. Parker*, 40 N. H. 47.

6. There is no rule of law by which the judge in his instructions to the jury would be required to settle questions of science, so as to put him in error for failing to do so: *Lucas v. M. Co. v. Best*, 3 Head (Tenn.), 701.

7. Experts may testify to meaning of technical terms: *Lewis v. Fothergill*, L. R. 5 Ch. App. 103; *Post* WORKINGS.

8. Expert testimony as to quality of coal, from statements of the engineer who burned it, is hearsay: *Perkins v. Stickney*, 133 Mass. 217.

9. Expert testimony is not admissible on matters of common experience: *Franklin Ins. Co. v. Graver*, 100 Pa. St. 266; *Hanna v. Barker*, 6 Colo. 303.

10. The reading of scientific books to the jury is not admissible: *People v. Hall*, 48 Mich. 482; 42 Am. R. 477. Except to contradict witnesses who have referred to such books: *Pinney v. Cahill*, 48 Mich. 584.

MORRIS v. SMITH.

(3 Douglas, 279. King's Bench, 1783.)

'Lessee can not hold lease and refuse to work—Accident from fault.

In covenant on a coal lease for rent payable unless defendant was prevented by unavoidable accident from working the pit, the defendant pleaded such accident, to wit: The penetration of water through faults. The proof showed that the working might have proceeded, though at great expense, and the defendant refused to surrender his lease: *Held* (in view of the refusal to surrender), that plaintiff was entitled to recover. "Unavoidable accident" considered.

This was an action of covenant on an indenture of lease of a piece of land for the purpose of sinking coal pits. Various breaches were assigned, but the material one was, that the defendant, who was assignee of the lease, ought to pay to the plaintiff a certain proportion of the value of nine hundred weight of coals to be raised, unless prevented by unavoidable accident from working the pit. The plea to this breach was, that the defendant was prevented by unavoidable accident, to wit, by large quantities of water unavoidably coming in and overflowing the coal mine, and unavoidably continuing and remaining therein; on which issue was joined. The cause was tried before BULLER, J., at the sittings for Middlesex, in this term, when it appeared that, after working the mine for some time, great quantities of water came in by faults in the mine, notwithstanding which the stipulated quantity of coals might have been got, but at a greater expense than they could possibly repay. The words in the exception were "merchantable coal."

BULLER, J., said that the defense was certainly not within the words of the exception, but desired the jury to find the facts specially. The jury, however, found for the plaintiff generally. A rule for a new trial having been obtained—

BEARCROFT and WOOD showed cause: "Merchantable coal" means that the coal when got should be of such a quality as to be salable. The term has no relation to the expense or profit of getting. [To this Lord MANSFIELD assented.] Is it the meaning of the covenant that the lessee shall have a

¹ But the plaintiff was afterward enjoined in equity: *Smith v. Morris*, 2 Br. Ch. Ca. 311; *Post LEASE*.

profitable bargain? Is he to be excused as soon as it becomes a losing bargain? But on these pleadings that question can not arise. The plea says that the water unavoidably continued and remained in the pit, but the jury have found that it might have been removed.

It is immaterial at what expense that removal might be effected.

LEE, S. G., and BALDWIN, *contra*.—The covenant must receive a reasonable interpretation, according to the intent of the parties, but it never could have been their intention that the water should be removed at all events and at whatever expense. Could it have been intended that the lessee should continue to raise coals at this expense for forty-five years, and thus entirely ruin himself? The accident was unavoidable by those means which a person working the mine for his own benefit would use. It could only be avoided at an expense which rendered the profitable working of the mines impossible.

The covenant merely meant to guard against the willful negligence or misfeasance of the lessee, and could never have been intended to embrace a case like the present. [BALDWIN, on the part of the plaintiff, here offered to accept a surrender of the lease.]

LORD MANSFIELD.—The offer to take a surrender of the lease and the refusal on the part of the defendant go a great way toward explaining the real nature of this case and the intention of the parties. This brings us to the consideration of the covenant. The lessor is to receive a rent in proportion to the coals raised, and therefore it becomes necessary to stipulate that a certain quantity shall be raised. But they are not to be raised in case of unavoidable accident. Unavoidable accident means an accident physically unavoidable.

An interruption for some months will not discharge the lessee. All coal pits are subject to such accidents. Upon these pleadings the profit does not come in question.

WILLES, Justice.—I am of the same opinion.

BULLER, Justice.—I am clearly of opinion that the deed will not bear the construction contended for by the defendant, which appears to have been an after-thought, subsequent to the pleadings being drawn. In my opinion the verdict is right.

Rule discharged.

DAVIS V. SHEPHERD.

(Law Reports, 1 Chancery App. 410. Court of Appeals in Chancery, 1865.)

¹ **Fault, affecting specific performance.** Where a fault was supposed to run in a certain direction so as to cut a piece of land into two tracts of about 83 acres and about 93 acres respectively, but it was afterward so developed as to show that only about eight acres was on one side and the balance on the other, *held*, that it was such a misconception of the truth that although the two tracts had been bargained for with the knowledge that there was some uncertainty as to quantity, no specific performance should be decreed of a contract to lease the parcel found to contain so many acres of excess.

The burden of proof lies upon the party seeking specific performance, to prove such fault so as to leave no reasonable doubt as to its location.

Miss E. M. Turberville, Sir G. L. Glyn and W. C. King, were, in 1861, joint owners in fee of a farm and lands called Blaenamman Fach Farm, in the parish of Aberdare, in the county of Glamorgan. The plaintiff, Davis, was at that time working coal to the east of the farm, the defendant, Shepherd, to the west. Other persons were working coal to the south, and from their workings it was supposed that a certain fault or dislocation of the strata called a "downthrow fault to the west," or an "upthrow fault to the east," traversed the farm in a direction nearly north and south, cutting it into two nearly equal parts, as mentioned below.

On the 1st of September, 1861, an agreement was made and signed between the agent for the owners of farm on the one part, and Shepherd and D. Evans (who afterward died) of the other part; and thereby it was agreed "that the said Miss Turberville, Sir G. L. Glyn and W. R. King shall grant, and the Messrs. Shepherd and Evans shall take a lease of the coal, ironstone and fire-clay, in and under a portion of the Blaenamman Fach Farm, situate in the parish of Aberdare, which lies to the *westward* of a downthrow fault to the west, *supposed to run through the said farm in the direction shown upon the plan*. The exact quantity can not at present be ascertained, but it is supposed to be eighty-three acres or thereabout." The agreement also provided that the lessees were to have power to take portions of the surface, not exceeding ten

¹ *Haywood v. Cope*, 6 M. R. 499.

acres, for the purpose of sinking pits and shafts, constructing railways and engine houses; that the term was to be fifty years from the 1st of November, 1861, at a certain rent of £185 a year and royalties also to be paid on the coal raised, according to the seam from which it came; and that the lessees should leave a barrier where required in each vein; and contained several other provisions. A plan was annexed to the agreement, in which a straight blue line was drawn, representing the supposed direction of the fault.

On the 19th of July, 1862, the owners made an agreement with the plaintiff, Davis, for a lease of the coal, ironstone and fire-clay to the *eastward* of the same fault, the quantity of land being therein described, as supposed, to be ninety-eight acres or thereabout, and the fault being called "an upthrow fault to the east," which was admitted to mean the same as "a downthrow fault to the west." The term was to be forty years, at a fixed rent of £200 and royalties. A similar plan was annexed, and the agreement was *mutatis mutandis* nearly in the same terms as that with Shepherd. It was in evidence that Davis had notice at this time of Shepherd's agreement.

No leases were granted pursuant to these agreements, but both the lessees commenced working the mines which they had agreed to take, Davis from his former works on the east, and Shepherd from his former works on the west.

Shepherd very soon encountered a fault not running near the line marked on the plan, but far to the west of it, so that, supposing it to continue, it would cut off to the west, not eighty-three acres, but only about eight acres. He, however, prosecuted his working through this fault, and proceeded to get the coal beyond it.

Davis thereupon filed his bill against Shepherd and the owners of the farm, alleging that this was the fault mentioned in the plan, and that Davis was entitled to a lease of all the coal to the east of this fault, and praying that Shepherd might be restrained from working coal to the east of this fault, and for an account.

A great quantity of evidence was given on each side, the plaintiff, among other things, adducing evidence to show that a fault was the natural and proper boundary between two collieries; that to take another line and leave a fault within

the bounds of a colliery would be contrary to the rules of good mining, and would render it necessary to leave a barrier of good coal between the two collieries, at loss to one or both, and to the owners; also, that the owners refused to let the coal to the plaintiff, unless he took it up to this fault.

The plaintiff moved for an injunction before Vice-Chancellor Wood, and the matter afterward came on upon motion for decree, when the Vice-Chancellor decreed an injunction and an account, without prejudice to any proceeding which any of the parties to the suit might take, for enforcing the specific performance of the agreements for leases.

The defendants appealed, and the appeal having been appointed to be heard before the full court, they moved that they might be at liberty to bring forward new evidence, discovered by them since the hearing. The plaintiff did not oppose this, and a great deal of further evidence was gone into on both sides, the defendants attempting to show that the fault in the adjoining colliery never reached the Bleanamman Fach Farm at all, and that the fault through which Shepherd had worked was not the fault mentioned in the agreement, but an independent fault.

April 21: Lord CRANWORTH, L. C., after stating the facts of the case and the pleadings, continued:

The case as it came before us was partly an appeal and partly an original cause. It was very fully and ably argued, and numerous points were made both as to the law and to the facts. I have given the case my best attention, and the result is, that I am unable to concur in the view taken of it by the Vice-Chancellor. His Honor considered it clear that the plaintiff was in possession of the mine from the eastern side of it up to the fault, and that the defendant having worked through that fault, was a mere trespasser. I am unable to go with His Honor in this view of the case.

When the owner of real property, whether surface land or minerals, binds himself by a written agreement to grant a lease, and suffers his intended lessee, without a lease, to take possession, he must be understood to allow the lessee to take possession of all which he has engaged to demise. In the case of a demise of unworked minerals, there can hardly be said to be actual possession of any part of them except of

what the intended lessee is actually working; but I think that when the lessor allows his intended lessee to take possession, and the lessee does take possession and commences working accordingly, he must be considered as constructively in possession of all which the lessor has bound himself to demise. I can not, however, think that the lessee can be treated by this court as constructively in possession of anything of which the lessor did not intend to put him in possession, and of which this court shall say the lessor is not bound to grant a lease. The result of granting an injunction in such a case might be that, when in subsequent litigation in this court the question should arise directly as to the extent of the property to be demised, it would turn out that the court had improperly restrained the owner from dealing as he thought fit with his own land or mines.

Proceeding, then, on this principle, the question to be answered is this: has the plaintiff shown that the defendants, the lessors, are bound to grant him a lease of the mines under Bleanamman Fach Farm, beginning from the eastern boundary up to the fault, through which the defendant Shepherd has been working? I think he has not. For, assuming the plaintiff to be right in saying that the upthrow fault to the east, through which the defendants have been working, is the same fault which diverges so much to the west before it reaches Bleanamman as to leave to the west of it not eighty-three acres, as marked on the plan, but only eight acres—assuming, I say, this to be so, I think this court would refuse to compel the intended lessor to grant a lease which would embrace an area of mine so very largely in excess of that which, as is obvious from the agreement and the plan, both parties contemplated.

It was said in argument that both the contracting parties knew there was uncertainty as to the extent of what was to be demised. No doubt that this is true. But the amount of that uncertainty is indicated, so far as such a matter can be indicated, by the language used. The fault is said to be “supposed to run in the direction shown by the line on the plan.” The exact quantity cut off to the east of the line is said to be “supposed to be ninety-eight acres or thereabouts.” It is impossible in such a case to define with accuracy what lati-

tude can be allowed as to the quantity to be demised—how much in enforcing the agreement the court would compel the lessor to allow beyond ninety-eight acres if the line of the fault should be proved to run to the west of the line shown on the plan. It is impossible, on such a subject, to lay down any general abstract rule, and if the deviation had been such as to include 108 acres, or even 118 acres, instead of 98 acres to the east of the line, it would have been open to fair argument that the excess might be covered by the vague words “or thereabouts.”

But I do not feel myself driven to solve any such questions in the present case. It is certain that neither party contemplated such an addition to the ninety-eight acres as the plaintiff is now contending for. The lessor had already agreed to demise to the defendant, Shepherd, all the mine to the west of the fault described as supposed to be eighty-three acres or thereabouts. This was known to the plaintiff. And when the plaintiff entered into this agreement, it could not have been in the contemplation of either party that under such loose and vague words as “or thereabouts” it could have been intended to oblige the defendant to accept eight acres instead of eighty-three acres; and I see no reason why the same principles which would guide the court in construing words of this sort in an agreement for sale or demise of the surface, should not be acted on when we are dealing with minerals, though, no doubt, there is in such subjects more difficulty in fixing a boundary.

On this short ground, I am of opinion that the plaintiff can not, in this court, be considered as being constructively in possession of any minerals not coming within the description of ninety-eight acres or thereabouts, and not separated from the western border of Blaennamman Fach by a line running in the direction, or nearly in the direction, of the line marked on the plan.

I have considered the case hitherto, adopting the hypothesis of the plaintiff, that the fault through which the defendant, Shepherd, has pushed his workings is the fault intended to be shown on the plan. But I desire it to be understood that I am by no means satisfied that this is the case. It is extremely difficult to appreciate accurately the evidence of the

persons who describe the nature and direction of the faults as traced in the adjoining mine. But I concur with both my learned brothers in the opinion that there seem to be very strong grounds for thinking that the fault marked on the plan may not be that through which the defendant, Shepherd, has penetrated. In order to establish his title, the plaintiff was bound to make this part of his case out, so as to leave no reasonable doubt on the subject, and he has failed to satisfy me on this point.

But I do not go into this question in detail, because, for the reasons I have stated, I think that, even if all this were made out in proof, this court can not treat the plaintiff as being constructively in possession of the mine now in dispute. My opinion, therefore, is that the decree we ought to make is simply to dismiss the bill, with costs.

Sir G. J. TURNER, L. J.

I fully concur in the Lord Chancellor's judgment, and in the reasons on which it is founded, and I should not have thought it right to occupy the time of the court in stating the reasons which have led me to the same conclusion, had I not fully considered the case and formed my opinion upon it before I was aware of the conclusion at which the Lord Chancellor had arrived.

The first question which presents itself is, what, according to the true construction of the agreement of the 19th of July, 1862, is the boundary of the mine agreed to be demised to the plaintiff? It is contended for the plaintiff that this boundary is the fault in question, through whatever part of the farm that fault may run. It is not necessary to consider what would have been the proper construction of this agreement if it had stopped at the words "upthrow fault to the east"—for these words are followed by a description of the fault as "supposed to run in the direction shown upon the plan annexed to the agreement," and by a statement that the quantity can not at present be ascertained, but is supposed to be ninety-eight acres or thereabouts, and the plan annexed to the agreement lays down the direction of the fault as leaving about ninety-eight acres to the east of the supposed fault. It

is argued for the plaintiffs that the parts of the agreement to which I have last referred amount to no more than *falsa demonstratio* of the words "upthrow fault to the east"; but I do not agree in that view. I think that the description of the property intended to be demised can not be taken merely from the words "which lies to the eastward of the upthrow fault to the east," but that the following words, at least so far as they refer to the supposed direction of the fault and as they refer to the plan, and likewise the plan itself, must also be considered as descriptive of the property intended to be demised, and that from the whole description of the property, taken together, it sufficiently appears that what was really intended by this agreement was an agreement to demise the ninety-eight acres or thereabouts bounded by the fault, if fault there was, in the direction marked on the plan; the reference to the supposed direction of the fault being inserted like the common words "more or less" in the description of parcels in a deed, to allow of any trifling diminution or increase which might be occasioned by the fault not running in the precise direction laid down in the plan.

It was further argued for the plaintiff that it was intended, both by the lessor and lessee, that each of them should take the chance of the quantity of the mine to be included in the demise, and that this was a mere matter of speculation on both sides; but this appears to me inconsistent with the whole tenor of the agreement. Could it have been intended that the lessee should pay a dead rent of £200 a year, when he might take a mere fraction of the mines from the fault happening to run nearer to those mines which he was already in the occupation of. And again, how is this supposed case of speculation to be reconciled with the mention of ninety-eight acres or thereabouts in the agreement and in the plan?

The view which I have thus taken of the construction of this agreement is, I think, much strengthened by reference to the correlative agreement of the 14th of September, 1861, which indeed more pointedly illustrates the observations I have made; inasmuch as, if the plaintiff's contention be well founded, and be applied to that agreement, Shepherd would have to pay a dead rent of £175 for eight acres of mine, and could not even have the ten acres of surface provided by that agreement.

I think, therefore, that the plaintiff's case, even upon his own agreement, can not be maintained; but supposing this point to be open to more doubt than it seems to me to be, there are other points which, in my judgment, are scarcely, if at all, less fatal to the plaintiff's case. The plaintiff coming into equity must, as it seems to me, found his title to relief upon one or other of these grounds, either upon his right under his agreement, or upon the footing of his being entitled to call for the assistance of this court in aid of a legal right. If we look at this case with reference to the plaintiff's right under his agreement, then I think it reasonably clear, for the reasons which the Lord Chancellor has stated, that specific performance of the agreement would not be decreed. I do not, however, go the length of saying that this is a case in which this court would set the agreement aside and order it to be canceled, as founded in mistake; although I am by no means prepared to say that the court would not do so, as the agreement seems to me to have proceeded on both sides upon the footing that the fault was supposed to run in the direction laid down upon the plan, and it has subsequently appeared that it does not in fact run in that direction.

If, then, the court would not have decreed specific performance of this agreement, ought the court to interfere at the instance of a plaintiff claiming under a title giving him no right in equity against a third person claiming with or without right, under a title similarly derived and antecedently created? I think it ought not so to interfere; for its interference must be based upon some equitable right giving title to such interference.

It was said on the part of the plaintiff that the question whether he was or was not entitled to have his agreement performed, was a question between him and his intended lessors, and that the defendant, Shepherd, has no right to set up the *jus tertii*. But a defendant in equity has surely a right to show that the plaintiff has no equitable title, and the evidence in this cause satisfies me that so far as the plaintiff's case rests upon specific performance, he has no such title.

The fact which appears upon the evidence, that the plaintiff, when he entered into his agreement, had notice of the agreement under which the defendant, Shepherd, holds, tends,

I think, very much to strengthen this part of the case against the plaintiff.

Then as to the plaintiff's right to call for the assistance of this court in aid of his alleged legal right, the case rests upon this: that possession having been given to him under his agreement, he became tenant from year to year upon the terms of that agreement. But assuming that there would be a tenancy from year to year in a case of this nature, on which I give no opinion, this argument, at all events, involves an inquiry of what mines possession ought to be considered to have been given to the plaintiff under his agreement.

This case of interference upon the footing of a legal title therefore works round again, as it seems to me, to the question what was intended to be demised, as to which I have already expressed my opinion.

I may add that looking to the evidence adduced since the hearing before the Vice-Chancellor, the plaintiff, on whom the *onus probandi* plainly rests, has certainly not satisfied me that the fault is not in fact a distinct and separate fault; and I may further add that the effect of this decree, proceeding as it does upon the assumed legal title, seems to me to give plaintiff indirectly the full benefit of his agreement according to his construction of it, although this court, if directly applied to for performance of that agreement, would not in my opinion have been justified in enforcing it.

Upon these grounds I find myself unable to agree in the opinion of the Vice-Chancellor, and I think that this bill ought to have been dismissed, and dismissed with costs.

Sir J. L. KNIGHT BRUCE, L. J.

Independently of any view which I may take, the concurrent opinion of the Lord Chancellor and Lord Justice is sufficient, and the bill stands dismissed. But I am bound to say that the plaintiff has not, in my opinion, established a sufficiently clear case to justify this court in interfering. The case is too obscure and difficult for an injunction, and the only course is to dismiss the bill.

Bill dismissed with costs. No costs of the appeal.

1. Every man who has anything to do with mining knows that coal mines are liable to faults: *Seymour v. Morrell*, MS. cited Rogers on Mines, 2d Ed., 377; *Ridgway v. Sneyd*, 1 Kay, 627; *Post LEASE*.

2. Faults treated as an ordinary risk in mining: *Lehigh Co. v. Harlan*, 27 Pa. St. 429; *Post LEASE*.

3. Hardship resulting from faults, considered: *Grove v. Donaldson*, 2 M. R. 507.

4. Faults considered as one of the difficulties operating to prevent partition of mines: *Coleman v. Coleman*, 19 Pa. St. 100; *Post PARTITION*.

5. A fault does not destroy the legal continuity of a vein: *Phillpotts v. Blasdel*, 4 M. R. 341; *Stevens v. Williams*, 1 M. R. 565.

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LORD DUDLEY V. LORD WARDE.

(1 Ambler, 113. High Court of Chancery, 1751.)

¹ **Colliery engines go to the tenant.** Tenant for life, or in tail, erects a fire engine to work a colliery. It shall, on his death, be considered as part of his personal estate and not go with the real estate to the remainder man.

Trade fixtures removable. What is annexed to the freehold is to be considered as part of it. But, between landlord and tenant, the latter may, during the term, remove what he erects for trade.

Buildings accessory to engines. Where engines, etc., are the principal, and the house only accessory, they may be removed, though the house be thereby injured.

² **Colliery, a trading concern.** A colliery is not only an enjoyment of the estate, but, in part, carrying on a trade.

William, Lord Dudley, died seized of a colliery, on which were erected four fire engines, three of which had been erected by Earl Edward, his father, who was tenant in tail of the estate (which came to Earl William under a settlement), and the fourth was erected by Earl William; but it did not appear whether Earl William was tenant for life or tenant in tail of the estate. Bill, by plaintiff, as administrator of William, against the defendant, who was remainder man of the estate, to have the four fire engines delivered up as part of the personal estate of Earl William.

Lord HARDWICKE, C., after arguments at bar.

There are two questions. The first is a general question: whether fire engines of this nature erected by a particular tenant, or by tenant in tail, are to be considered as part of the owner's real or personal estate.

Second question is, as to three of the fire engines not erected by Earl William, but by Earl Edward, whether they will follow the same rule as those erected by the last tenant, Earl William.

To first: There have been many questions of this kind, both in law and equity, and some determinations on very nice and almost frivolous circumstances; but some general rules

¹ *Merritt v. Judd*, 6 M. R. 62.

² *Williams v. Attenborough*, 2 M. R. 410.

are very clear, as what is annexed to the freehold is to be considered as part of it, and yet there are some exceptions to that rule, as between landlord and tenant; what is erected by the latter for the sake of trade may be removed, though fixed to the freehold; indeed such removal must be during the term, or he will be a trespasser; so marble chimney-pieces, etc.: but this does not hold between the heir and executor; so might these engines be removed as between landlord and tenant.

And though the case between landlord and tenant does not hold so strongly throughout, yet it answers one objection, viz.: that a house has been built to which the fire engine is annexed, and that the executor can not pull down the house; but the distinction is, where the house is the principal, and where only the accessory; here the engine is the principal, therefore it is like the case of coppers, etc. You can not take them away without spoiling the walls; yet as they are the principal, and the building is only the better to enable the use of them, they may be removed. The case, being between executor of tenant for life in tail and a remainder man, is not quite so strong as between landlord and tenant; yet the same reason governs it if tenant for life erects such an engine.

In the case of *Lawton v. Lawton*, it was determined it should go to executors, partly on the reasons there mentioned and partly on the authority of the case of a cider-mill, there cited to have been so adjudged by Lord C. B. COMYNS; that of *Lawton v. Lawton*, 3 Atk. 13, was the case of creditors; but that makes no difference, because the question is whether part of the real or personal estate. If it is so in the case of tenant for life, *query*, how would it be in case of tenant in tail? Tenant in tail has but a particular estate, though somewhat higher than tenant for life.

In the reason of the thing there is no material difference; the determinations have been from consideration of the benefit of trade. A colliery is not only an enjoyment of the estate, but in part carrying on a trade. The reason of emblements going to the executor of a particular tenant holds here, to encourage agriculture. Suppose a man of indifferent health; he would not erect such an engine, at a vast expense, unless it would go to his family.

It is no argument to say the colliery could not be worked

without these engines. They are of late invention, not above forty years ago; how were collieries worked before? They may be more beneficially worked than without them.

Second question. As to three of the fire engines, plaintiff is not entitled to them, for he sues only as administrator to William, Earl of Dudley, and they were erected by Earl Edward. Plaintiff must recover on his own strength, and show a title, which he has not done, for the representative of Edward, Earl Dudley, is entitled, who was Lady Diana Fielding; and plaintiff is neither representative of Lady Diana nor of Earl Edward. But said William, Lord Dudley, had possession so long that the statute of limitations might be pleaded by him to any claim made against him; but that does not give the plaintiff title, nor is it clear the statute of limitations would take place, for there are many exceptions in it, as infancy, etc.; but supposing the plaintiff to be suing as representative of Edward, Earl Dudley, yet it appears that after his death there was a dispute between William, Lord Dudley, and Lady Diana Fielding, who was executrix of Edward; and that upon Lord Talbot's opinion, that those engines belonged to the inheritance, Lady Diana gave them up, not as a gift to William, Lord Dudley, but as a gift to and part of the inheritance. Therefore, decree the one engine erected by William, Lord Dudley, to the plaintiff, and dismiss the bill as to the other three engines.

EARL OF MANSFIELD V. BLACKBURNE, Ex'r.

(6 Bingham's New Cases, 426; 8 Scott, 720. Common Pleas, 1840.)

¹ **Salt pans.** Plaintiff demised salt springs to defendant, who was to erect salt works on the premises, and pay a rent in proportion to the number of works erected. Defendant covenanted to leave the works in good repair at the end of the term. *Held*, that iron salt pans, placed by defendant on a frame of brick and used in the boiling of salt, were parcel of such works,² and that defendant was not entitled to remove them.

¹ *Lemar v. Miles*, 4 Watts, 330.

² *Works* held not to include tramways: *Beaufort v. Bates*, 6 M. R. 75.

This was an action of covenant, tried before VAUGHAN, J., at the Chester summer assizes, 1838. The declaration stated that on the 26th of March, 1798, by indenture then made between B. Langlois and J. Laidlaw (both since deceased), of the first part, the plaintiff of the second part, John Blackburne, deceased (the defendant's testator), and one John Blackburne of Liverpool, of the third part,—[after reciting that by indenture bearing date the first of February, 1758, and made between William, Earl of Mansfield, deceased, of the one part, and John Blackburne of Orford, Esq., since deceased, and John Blackburne, his son, of the other part, the said William, late Earl of Mansfield, for the considerations therein mentioned, did demise unto the said J. B., and J. B. their executors, administrators and assigns (amongst other things), a certain close, meadow or parcel of land, with certain rock salt, mines of rock salt, and springs of brine near Northwich, in the county of Chester; with free liberty, full power and authority to and for them, the said J. B. and J. B., to bore, search, dig and sink for, get and take to their own proper uses, rock salt or salt rock and brine at his and their own wills and pleasures; and for that purpose, on the said demised premises, or any part thereof, to make, dig or sink any number of rock salt or brine pit or pits, air or water pits, shaft or shafts, or any holes, tunnels, hollows, eyes, drifts, pipes or cavities, for the finding, discovering, getting and taking of rock salt, salt rock or brine in the said demised premises, or any part thereof; and also free liberty in and upon the said demised premises, or any part thereof, to make, set up, erect and build, and to use and enjoy any rock salt house or houses, storehouse or storehouses, warehouses or other building, engine or engines, place or places, for the laying and storing, securing, preserving or keeping rock salt or salt rock, or for making, laying up, storing, securing, preserving or keeping of white salt, as they or either of them should think proper; and also free liberty to build or erect any kay or kays as therein mentioned: to have and to hold the said liberties unto the said J. B. and J. B., parties thereto, their executors, administrators and assigns, from the 25th of March then next, for the term of forty years; in which said indenture of lease the said William, late Earl of Mansfield, did, for him-

self, his heirs and assigns, covenant, promise and agree to and with the said J. B. and J. B., parties thereto, their executors, administrators and assigns, that he, the said William, Earl of Mansfield, his heirs and assigns, should and would, within the space of one month after the expiration of the term thereby demised, at the request, costs and charges of the same J. B. and J. B., or either of them, their or either of their executors, administrators or assigns, seal and duly execute a new lease of the said demised premises and privileges, and of all the works, pits, kays, buildings and engines to be by them erected and made on the said premises, unto the said J. B. and J. B., or either of them, their or either of their executors or administrators, for the further term of forty years, to commence from the expiration of the term thereby demised: and after further reciting that the said William, late Earl of Mansfield, died in the year of our Lord 1793,]—the said B. Langlois and J. Laidlaw, and also the plaintiff did, and each and every of them did, demise unto the said J. B., deceased, and J. B., of Liverpool, parties to the indenture first above mentioned, their executors, administrators and assigns, the said close, meadow or parcel of land with the hill thereto adjoining, and the appurtenances thereunto belonging, comprised in the said indenture of lease secondly above mentioned, and all and every the messuages, dwelling houses, wiah-houses, salt houses, erections, buildings, pits, eyes, shafts, tunnels, and other matters and things since made at, in, upon or under the said premises thereby demised for the use and convenience of carrying on the said salt trade, with free liberty, power and authority to and for them, their executors, administrators and assigns, or any of them, their agents, servants or workmen in the said meadow or parcel of land and hill thereto adjoining, or any part thereof, in such manner and by such ways and means as they, the same J. B., deceased, and J. B., of Liverpool, their executors, administrators and assigns or any of them, should from time to time think proper, during the term of forty years therein mentioned, to bore, search, dig, and sink for, get, and take to their own proper use and uses, rock salt or salt rock and brine at their wills and pleasures; and for that purpose, in the said thereby demised meadow or parcel of land and hill thereto adjoining, or any

part of either of them, to make, dig, or sink, or cause to be made, dug, or sunk, any number of rock salt or brine pit or pits, air or water pits, shaft or shafts, or any holes, tunnels, hollows, eyes, drifts, pipes, or cavities for the finding, discovering, getting and taking of rock salt, salt rock, or brine, in the said meadow or parcel of land and hill thereto adjoining, thereby demised, or any part thereof, when they or either of them, their or either of their executors, administrators or assigns should from time to time think proper; and there to get and take all such rock salt or salt rock as should be there found or gotten, and from the brine springs there discovered to make white salt, and the same when so found and gotten, to take, dispose of, and convert to their own proper use, benefit, and advantage; and also free liberty in and upon the said meadow or parcel of land and hill thereto adjoining, thereby demised, or any part thereof, to make, set up, erect and build, or cause to be made, set up, erected and built, and to use and enjoy any rock salt house, storehouse or storehouses, warehouses or other buildings, engine or engines, place or places for the laying and storing, securing, preserving, or keeping rock salt or salt rock, or for making, laying, laying up, storing, securing, preserving or keeping of white salt, as they or either of them should think proper; and, amongst other liberties, free liberty to build a quay or quays, or other conveniences upon the river as therein mentioned; to have and to hold the said meadow or parcel of land and hill thereto adjoining, liberty of making rock salt or salt rock pits, air or water pits, brine pits, or other works, and of getting and taking rock salt or salt rock and brine in the said thereby demised premises, and all other the liberties, privileges, and premises, whatsoever intended to be thereby demised, with their and every of their appurtenances, subject, as aforesaid, unto the said J. B., deceased, and J. B., of Liverpool, parties thereto, their executors, administrators and assigns, from the 25th day of March last past before the date of the said indenture first above mentioned, for the term of forty years; subject nevertheless to the provisions, conditions, restrictions, and agreements thereinafter mentioned concerning the same; yielding and paying yearly and every year during the said term the yearly rent therein mentioned; and the said J. B., deceased, and J.

B. of Liverpool, for themselves jointly and severally, and for their joint and several heirs, executors, administrators and assigns, did thereby covenant, promise and agree to and with the said B. Langlois and J. Laidlaw, their heirs and assigns, and also, to and with the plaintiff and his assigns, and such other person or persons as for the time being should be entitled to the reversion immediately expectant on the determination of the term intended by the said indenture to be granted of or in the said tenements and premises, and to and with every of them, that they, the said J. B., deceased, and J. B., of Liverpool, parties thereto, their executors, administrators and assigns, or some of them, should and would from time to time, and at all times thereafter during the said term thereby demised, pay unto the said B. Langlois and J. Laidlaw, their heirs and assigns, or the said plaintiff and his assigns, and such other person or persons as aforesaid, the yearly rent of £8; and also the yearly rent or sum of £7 10s over and above the said yearly rent of £8 thereinbefore reserved, without any deduction, defalcation, or abatement whatsoever, for each and every *salt pan* which then already had been, or thereafter during the term thereby demised should be erected or set up on the demised premises, or any part thereof, or be used for the making of white salt; and further, that they, the said J. B., deceased, and J. B., of Liverpool, parties thereto, their executors, administrators, and assigns, should and would, from time to time, and at all times during the term thereby demised, at their own costs and charges, keep and maintain all and every the building and buildings, *kay* and *kays*, *work* and *works*, then standing and being upon the said premises, or any part thereof, and all and every such other edifices and engines as should be at any time during the said term thereby granted, erected, set up, built, or made in or upon the said demised premises, or any part thereof, in good and sufficient repair and condition; and at the end or other sooner determination of the said term, should and would yield and deliver up all and every the said premises mentioned to be thereby demised and all such buildings, *kays*, works, edifices, and engines in good and sufficient repair and condition unto the said B. Langlois and J. Laidlaw, their

heirs or assigns, or the said plaintiff or his assigns, or such other person or persons as, for the time being, should be entitled to the reversion immediately expectant on the determination of the term intended by the said indenture to be granted of or in the said tenements and premises, in a quiet and peaceable manner.

The declaration then averred that the said John Blackburne, deceased, and John Blackburne, of Liverpool, both died during the said term granted by the indenture first above mentioned,—the said J. B., deceased, having survived the said J. B., of Liverpool,—and alleged the following breaches: that the said J. B., of Liverpool, and J. B., deceased, during their joint lives, and the said J. B., deceased, after the death of the said J. B., of Liverpool, and the defendant as executor as aforesaid since the death of the said J. B., deceased, did not, during the said term, at their own costs and charges, keep or maintain all and every the building and buildings, and kays and kays, work and works, standing and being upon the said premises or any part thereof, as aforesaid, and all and every other such edifices and engines as had at any time during the said term been erected, set up, built, or made, in or upon the said demised premises, or any part thereof, in good and sufficient repair and condition; nor did they, or any of them, at the determination of the said term, yield or deliver up *all and every the said premises thereby demised, and all* such buildings, kays, *works*, edifices and engines in good and sufficient repair and condition unto the said B. Langlois and J. Laidlaw, their heirs or assigns, or to the plaintiff or his assigns, or such other person or persons as should be entitled as aforesaid, in a quiet and peaceable manner, according to the form and effect of the said indenture in that behalf; but suffered and permitted the said buildings, kays, works, edifices and engines to be and continue, and the same were for and during all that time ruinous, prostrate, fallen down, and in great decay, for want of keeping and maintaining the same in such good and sufficient repair and condition, as aforesaid; and also the defendant, as such executor as aforesaid, at the expiration of the said term, to wit, on the 25th of March, 1838, pulled down, took down, dug up, tore up, and carried away divers of the said buildings, kays, *works*,

edifices and engines, to wit, forty houses, forty outhouses, etc., forty troughs, forty pipes, 400 yards of troughs, 400 yards of pipes, etc., etc., ninety *salt pans*, etc., etc.

The defendant pleaded, as to the alleged breach in the pulling down, taking down, tearing up, and carrying away of the said buildings, kays, works, edifices and engines in the declaration mentioned, that he, the defendant, as such executor as aforesaid, did not, at the expiration of the said term, pull down, take down, dig up, tear up, or carry away the said buildings, kays, works, edifices and engines, or any or either of them, in manner and form as the plaintiff had in that behalf alleged; on which issue was joined.

And as to the other breaches in the declaration alleged, the defendant pleaded payment into court of the sum of £275, to which the plaintiff replied, that he had sustained damages to a greater amount; on which also issue was joined.

At the trial it appeared that the two leases set forth in the declaration were granted on the several days, and by and to the several parties therein mentioned.

After the grant of the lease of the 1st of February, 1758, and before the grant of the lease of 26th of March, 1798, the lessees erected on the premises divers warehouses, storehouses, pan houses, reservoirs, kays, an engine house with a steam engine, dwelling houses and cottages, and other permanent buildings; and sunk a brine pit or shaft, into which a pump was inserted; they also set up ten salt pans, each within a pan house, which pans, being subject to great wear and tear, from time to time they renewed, and repaired by cutting out the worn parts and putting in new plates; they also laid down a quantity of pipes and troughs. The pans, pipes and troughs continued in the same position in which they were respectively erected and laid down, until they were removed by the defendant as hereinafter mentioned. The salt pans were composed of plates of iron and were about twenty-six feet long by twenty-six feet wide, and rested by their own weight, without any fastenings, upon low brick walls, in the sides of which were iron fire-hatches or bars, within which were the fires by which the pans were heated. The pans had rings on their sides by which they were lifted off to be repaired. The pipes and troughs were conduits for conveying the brine to the various

salt pans. The engine worked the pump which raised the brine out of the brine shaft into open troughs or spouts of wood, elevated on wooden trestles at a height of several feet, whence the brine ran down into a large cistern or reservoir outside the gates of the works, from which a main pipe of wood was laid under ground (the upper part thereof being only a few inches below the surface of the ground), into the area or open space of ground within the gates of the works; and from this main pipe branch pipes of wood were laid, at some places above and at others a little below the surface of the ground, through holes in the walls of the pan houses, to each salt pan. Two other salt pans of the same kind, and constructed in the same manner, were erected about twelve years ago by lessees under the lease of 1798.

Shortly before the determination of the lease of 1798, the defendant, as executor of the surviving lessee, removed the twelve salt pans, the pump, with its trees and rods, the fire-hatches, and all the troughs and pipes above described, excepting such as were laid within and under the buildings. They could be got at, but were left because they were not worth the trouble and expense of removing. The pans could not be got out without pulling down part of the gable end of the pan houses, which was accordingly done in each pan house; and the damage thus occasioned to such pan houses was included in the plaintiff's particular of breaches. The earth disturbed by the removal of the underground pipes was replaced. The defendant only took away the articles before enumerated, leaving the steam-engine, cisterns, landing cranes, stages, pan houses, reservoirs, and every other erection and building characterized by the term salt works.

The value of the salt pans was agreed to be £1,033; and of the pump, fire-hatches, troughs, and pipes, £150.

At the trial, the jury found the first issue for the plaintiff, with £1,183 damages for the value of the articles carried away; and they found the second issue for the defendant; the learned judge who tried the cause giving leave to move to enter the verdict on the first issue for the defendant, if the court should be of opinion that the articles which had been carried away did not fall within the meaning of the covenant on which action was brought.

A motion was subsequently made on the part of the defendant, pursuant to the leave reserved by the learned judge, to enter a verdict for the defendant on the first issue; and on the part of the plaintiff, pursuant to like leave, that in the event of the damages on the first issue being reduced by the court, the verdict for the defendant on the second issue should be set aside, and a verdict should be entered for the plaintiff on that issue for the amount of such reduction; upon which motion rules *nisi* were granted.

Evans, on moving for the rule to enter a verdict for the defendant, contended that these pans were chattels, not affixed to the freehold, and that they did not fall within the description of salt *works* which the defendant had covenanted not to remove.

Under the original lease the lessee was to construct the salt works, and then to set up the pans, and pay an additional rent for the works in proportion to the number of pans set up; the pans were not mentioned in the clauses of demise, or in the covenant to leave in repair; and, according to the practice of the salt counties, a lessee, who should propose to take salt works, would not expect to find them provided with pans.

It was said in *Lawton v. Salmon*, 1 H. Bl. 259, n., that "a salt *work* consists of buildings, etc., for the purpose of containing the pans," thereby distinguishing the works from the pans. In that case, indeed, as between heir and executor, the pan was held to be affixed to the freehold, and to belong to the heir; here the question was between lessor and lessee, and turned only on the meaning to be put on the word *works* in the lessee's covenant; but in *Lawton v. Lawton*, 3 Atk. 13, it was held that a fire engine, set up for the benefit of a colliery by a tenant for life, should be considered as part of his personal estate, and therefore should go to executor for the increase of assets in favor of creditors; and in *Naylor v. Collinge*, 1 Taunt. 19, it was held that, though a covenant, by a tenant, to yield up in repair, at the expiration of his lease, all buildings which should be erected during the term upon the demised premises, included buildings erected and used by the tenant, for the purpose of trade and manufacture, if such buildings were let into the soil, or otherwise fixed to the freehold, yet, that it did not include them where, as in the present case, they rested upon blocks or pattens.

WILDE, Serjt., and E. V. WILLIAMS, who showed cause in Trinity term, 1839, argued, that the salt *works* necessarily included the pans, as the works would be incomplete, and the brine spring useless without such pans; that the lessor in the first lease had contemplated the erection of such pans; in the second lease had described them as existing, and therefore must be considered as having demised them under the general description of *works*. They were not specified in the covenant to leave in repair, because the word *works* sufficiently comprehended them, and an enumeration of particulars is always pregnant with risk of litigation.

Naylor v. Collinge only decided that certain articles, there the subject of dispute, were not fixtures, and *Martyr v. Bradley*, 9 Bingh. 24, that in the lease of a mill, millstones would not pass under the word improvements. The question here was as to the meaning of the defendant's covenant; and as ten of the pans, at least, were taken under the last lease of the salt works, they must be considered to form a part of those works as much as sails part of a windmill.

EVANS and WELSBY were heard in support of the rule.

Cur. adv. vult.

TINDAL, C. J.

This was an action of covenant brought to recover damages for the breach of the covenant contained in a renewed lease of certain salt works, whereby the lessees covenanted to keep and maintain in good and sufficient repair, "the buildings, kays, and works then standing and being on the premises, and all and every other such edifices and engines as should be at any time during the term erected, set up, built, or made in or upon the demised premises," and at the determination of the term to deliver up "all the premises mentioned to be thereby demised, and all such buildings, kays, works, edifices and engines in good and complete repair and condition."

The breach stated in the declaration was as well for not keeping in repair, as for not delivering up in such good repair, at the determination of the term, the buildings, kays, works, edifices and engines, but on the contrary, at the determination of the term, carrying away from the premises divers articles and things enumerated in the declaration.

The defendant as to the pulling down and carrying away the articles enumerated, pleaded "that he, the defendant, did not, at the expiration of the said term, pull down, take down, dig up, tear up, or carry away the said buildings, kays, works, edifices, and engines, or any or either of them, in manner and form, etc."

And as to the residue of the breach of the covenant, that is, to the non-repair of the premises, the defendant paid money into court, averring that the plaintiff had not sustained any damages beyond the sum so paid in. At the trial the jury found the first issue for the plaintiff with damages for the value of the articles carried away; and they found the second issue for the defendant; the learned judge who tried the cause giving leave to move to enter the verdict on the first issue for the defendant, if the court should be of opinion that the articles which had been carried away by the tenant did not fall within the meaning of the covenant on which the action was brought.

The articles for the removal of which the action was brought, consisted of certain salt pans in which the brine was manufactured into salt, and also certain pipes by which the brine was brought from the salt spring into the brine pits; the salt pans being made of plates of iron, supported upon brick-work, and having rings on their sides by which they were lifted off to be repaired; the pipes being metal pipes, partly carried under ground and partly along troughs supported by trestles. No real distinction, however, appears to us to arise between the salt pans and the pipes as to the application of the law which we conceive to apply to the present case.

If this had been the ordinary case between landlord and tenant, as to the right of the latter to remove fixtures, or other things erected on the premises at the end of the term, we should have entertained no doubt but that the salt pans had been removable by the tenant, as well from the nature and description of their annexation to the freehold as upon the doctrine laid down by Lord MANSFIELD in *Lawton v. Salmon*, 1 H. Bl. 259, in note, "that it would have been a different question if the springs had been let and the tenant had been at the expense of erecting these salt works; he might very well have said, 'I leave the estate no worse than

I found it'; that would be for the encouragement and confidence of trade, and the benefit of the estate."

The question before us does not turn upon any general rule of law, but upon the interpretation of a positive contract into which the parties have entered with each other; and the point we have to determine is, whether under that contract it was the intention of both parties that the salt pans should be left at the determination of the term, or that the tenant should have the power to remove them.

The lease in question is a lease granted in 1798, under a covenant to renew, contained in a former lease of 1758, such former lease being recited in the renewed lease, and also set forth in the declaration. The former or original lease was a demise of a close, meadow, or parcel of land, and hill, and the rock salt mines of rock salt, and springs of brine in the same, with all the particular liberties enumerated in the lease, for the purpose of establishing salt works, and making salt for sale; "and all such other liberties and privileges as were usually enjoyed by the proprietors of rock salt pits or brine pits in or near Northwich, in the county of Chester." And it appears from that lease that it was granted before the first erection or creation of the salt works, which were to be made and completed by the tenants under the powers given by such lease. It further contains a covenant on the part of the lessors, within one month after the expiration thereof, to execute a new lease of the said demised premises and privileges, "and of all the works, pits, kays, buildings, and engines to be by them erected and made on the same premises," importing, therefore, that the renewed lease should be a lease of such salt works as at the date of the renewal might have been erected, made, and worked under the former lease. The original lease then contains a covenant to pay, amongst other rents, "an additional rent of £7 10s for every salt pan which during such further term should be erected, worked, or made use of by the said tenants for the making of white salt."

Now that a salt pan is part of the works necessary for the making of white salt from brine appears from the lease itself to have been well understood by both the contracting parties; it was so essential a part that it forms the basis of the calculation of the rent to be paid by the tenant; and further, this

salt pan is by the lease itself described to be "erected, worked, and made use of by the tenants in making salt."

The renewed lease, after reciting the former lease, recites also the fact that the lessees "had erected and set up divers engines, machines, roads, and other conveniences, as well for the use and the convenience as for the managing and carrying on at, in, or upon the said demised premises, the trade or business of rock salt or salt rock getters and refiners, or manufacturers of white salt"; and after this recital, contains a demise to the defendant's testator and the other lessee, not only of the close, meadow, or parcel of land, and hill, as in the original lease, but also a demise of "all and every the messuages, dwelling houses, wick houses, salt works, erections, buildings, and other matters and things since made at, in, or upon or under the said demised premises for the use and convenience of carrying on the said demised trades."

And under this demise of the salt works and other things as they were then carrying on, we think must be included all that was erected and set up on the premises that was essentially necessary to constitute a salt work, and that such description must include salt pans, without which the trade of a manufacturer of brine salt could not be carried on at all, and which salt pans, it is to be observed, are by the very terms of the lease described to be "erected and set up."

The language of the lessee's covenant for payment of the additional rent of £7 10s, is in this respect clear and unambiguous; it is, "for each and every salt pan which already hath been, or hereafter during the term hereby demised shall be erected or set up on the said demised premises, or used for the making of white salt."

The legal construction of the words of demise in the renewed lease being therefore sufficient, as we think they are, to comprise the salt pans, "then erected or set up on the premises," as a necessary and constituent part of the salt works, we think the construction of the covenant to yield and deliver up, at the end of the term, "all and every the premises demised," must be equally large and comprehensive, and must be held to include the salt pans, without which the salt works demised have lost their character and use, and must cease to be salt works altogether.

It has been urged in argument, that as the term "salt pans" occurs so repeatedly in the lease, the inference is that the parties would have mentioned them specifically by name in the covenant to leave things on the premises if they had been intended to be comprised within it; but we think the answer given at the bar is sufficient, that the parties might avoid the expression of this particular article, from the apprehension that any others which were necessary to constitute a salt work might be excluded, because not enumerated.

Looking, therefore, to the legal construction of the covenant, we think it comprises the salt pans, as a thing erected or set up on the premises, and which is at the same time essential to the existence of the salt works demised, and consequently that the rule for setting aside the verdict on the first issue, and entering it for the defendant, must be discharged. The cross-rule obtained by the plaintiff, which has now become unnecessary, must at the same time be also discharged.

Rules discharged.

VOORHIS V. FREEMAN.

(2 W. & S. 116. Supreme Court of Pennsylvania, 1841.)

¹ **Distinction between trade and other fixtures.** The criterion of a fixture in a mansion house or dwelling is actual and permanent fastening to the freehold, but this is not the criterion of a fixture in a manufactory or a mill.

² **Machinery temporarily detached—Different rule applied to vendors and lessors.** Machinery which is a constituent part of the manufactory to which the building has been adapted, without which it would cease to be such manufactory, is part of the freehold though not actually fastened to it; and this criterion has a place in questions between vendor and vendee, heir and executor, as well as debtor and execution creditor; but not between tenant and landlord or remainder man. *Ruled*, therefore, that a mortgage and sale of a lot and rolling-mill with the buildings, apparatus, steam engine, boilers and bellows attached to the same, passed the entire set of rolls used in the mill, whether actually in place or temporarily detached, and that such rolls could not be seized as chattels on execution against the mortgagor.

¹ *Holbrook v. Chamberlin*, 116 Mass. 155; 17 Am. R. 146.

² *Hendy v. Dinkerhoff*, 57 Cal. 3.

Apparatus. Without the application of this rule the word *apparatus* used in the conveyance would have been sufficient to bring the same result.

Error to the District Court of Allegheny County.

This was an action of trover by A. L. Voorhis against John Freenan for the conversion of one hundred and six soft and chilled rolls, which were part of the machinery of an iron rolling mill, situate in the city of Pittsburgh, and which were admitted to be of the value of \$3,863. The plaintiff claimed the property by virtue of a sheriff's sale under an execution on a judgment which he had obtained against Leonard Sample, a former owner of the mill. The defendant claimed it by virtue of a previous sheriff's sale and conveyance under a *levari facias* on a mortgage by Sample, in which the premises were described as "a lot or piece of ground with one iron rolling mill establishment situate thereon, with the buildings, *apparatus*, steam engine, boilers, bellows, etc., attached to the said establishment." The fact of demand and refusal as evidence of conversion was admitted; and the questions simply were whether the rolls were real or personal property, and if the latter, whether they did not pass by the descriptive terms of the mortgage.

The court below (GREER, president) ruled both these points against the plaintiff, instructing the jury that the property in dispute was a part of the realty, and passed by the sale upon the mortgage.

M'CANDLESS and BIDDLE, for plaintiff in error.

CRAFT and LOOMIS, for defendant in error.

The opinion of the court was delivered by GIBSON, C. J.

It is true we ruled in an unreported case (*Chaffee v. Stewart*) that the spindles and other unattached machinery in a cotton mill were personal property for purpose of execution on the authority of certain decisions to that effect, because we were indisposed to be wise above what is written; but an examination of their foundation would probably have led us to a different conclusion. It is unnecessary to pass the learning of the subject in review, as a clear bird's eye view of it has

been spread before the profession by Mr. Justice COWEN, in *Walker v. Sherman*, 20 Wend. 636, from which it is evident that no distinctive principle pervades the cases universally, and that the simple criterion of physical attachment is so limited in its range, and so productive of contradiction even in regard to fixtures in dwellings, to which it was adapted before England had become a manufacturing country, that it will answer for nothing else. My objection to the conclusion drawn from it in that case is, that the court adhered to the old distinction, when the question related to a woollen factory, instead of following out the principle started by Justice WESTON in *Farrar v. Stackpole*, 6 Greenleaf, 157, which must, sooner or later, rule every case of the sort. The courts will be drawn to it by its liberality and fitness, while they will be drawn away from the old criterion by its narrowness and want of adaptation to the business and improvements of the age. By the mere force of habit they have adhered to it in almost all cases after it has ceased to be a guide in any but a few, for nothing but a passive regard for old notions could have led them to treat machinery as personal property when it was palpably an integrant part of a manufactory or a mill, merely because it might be unscrewed or unstrapped, taken to pieces and removed without injury to the building.

It would be difficult to point out any sort of machinery, however complex in its structure, or by what means soever held in its place, which might not, with care and trouble, be taken to pieces and removed in the same way, and the greater or less facility with which it could be done would be too vague a thing to serve for a test. It would allow the stones, hoppers, bolts, meal-chests, screens, scales, weights, elevators, hopper-boys and running gears of a grist mill, as well as the hammers and bellows of a forge, and parts of many other buildings erected for manufactories, to be put into the class of personal property, when it would be palpably absurd to consider them such. If physical annexation were the criterion in regard to such things, the slightest tack or ligament ought to constitute it; else if we were to get away from it even ever so little we should have no criterion at all. There are so many fashions, methods and means of it and so many degrees of connection between material substances, that

there is nothing about which men would more readily differ than whether a thing held by a band or a cleat were permanently annexed to the freehold, or only for a season; and the proof of this is seen in the results of the decisions professedly regulated by it. To avoid discrepancy, it would be necessary to hold the slightest fastening to be sufficient, but to exclude from the character of real property, as well everything constructively attached to it by the nature of the thing, as every thing held to the ground by the attraction of gravitation. Thus cleared of its exceptions, the rule of physical annexation, though at best a narrow one, might furnish a criterion of universal application, though without them it would make havoc of the cases already decided, and indeed produce the most absurd consequences by stripping houses of their window-shutters and doors, and farms of the houses themselves. When, therefore, we reflect on the necessary exceptions to the rule, as well as the cases of constructive attachment without the semblance of a tack or ligament, we are not surprised at the confusion and embarrassment in which we are left by the decisions. The inherent imperfections of the rule required so many exceptions to it in order to avoid absurdity and injustice in its application, that it has almost ceased to be a rule at all. Being purely artificial, and having no regard to the purposes for which capital is invested, a rigid application of it would be ruinous to the manufacturer.

In Pennsylvania, where a statute directs that real estate shall not be sold on execution before the rents, issues and profits shall have been found by an inquest insufficient to satisfy the debt in seven years, not only might this conservative provision be evaded, but a cotton spinner for instance, whose capital is chiefly invested in loose machinery, might be suddenly broken up in the midst of a thriving business, by suffering a creditor to gut his mill of everything which happened not to be spiked and riveted to the walls, and sell its bowels not only separately but piece-meal. A creditor might as well be allowed to sell the works of a clock, wheel by wheel. His interest, it may be said, would forbid him to do so; but in the case of a manufactory, he would often be compelled to sell a part, or to sell many times the worth of the debt, and none but a person entering into the business would purchase either a part or the

whole. The sacrifice that would be induced by either course, is incalculable; but that is not all. The bare walls of the building would be comparatively of little value. They might perhaps answer the purposes of a barn, but so might the walls of a dwelling when deprived of their doors and windows; and why are these considered a part of a dwelling? Simply because it would be unfit for the purposes of a dwelling without them. What then is demanded in the case of a building erected for a manufactory, but an application of the same principle? Whether fast or loose, therefore, all the machinery of a manufactory which is necessary to constitute it, and without which it would not be a manufactory at all, must pass for a part of the freehold. This is no more than an enlargement of the principle of constructive attachment, and it is the principle of *Farrar v. Stackpole*, glanced at by Lord MANSFIELD, in *Lawton v. Lawton* (1 H. B. 259, note), who seems to have foreseen its day. I speak not here of questions between tenant and landlord or remainder man, but of those between vendor and vendee, heir and executor, debtor and execution creditor; and between co-tenants of the inheritance. With this limitation, nothing said or done by this court, except its decision in *Chaffee v. Stewart*, already mentioned, and an *obiter* recognition of an adverse decision by the judge who delivered the opinion of the court in *Gray v. Holdship*, 17 Serg. & Rawle, 415, will be found to conflict with the principle proposed. Certainly nothing else ever said by us gives countenance to the notion that the rolls of an iron mill may be seized and sold as personal property.

But such rolls being adapted to the manufacture of bars of different shapes and sizes, can not all be used at once, and according to the ordinary criterion, only those in place and fixed for use would be deemed a part of the mill. But by the criterion proposed, they must be deemed equally a part of it when unfixed to give place to others; for a rolling mill without rollers for all work would be as incomplete as a hatter's shop without blocks for all heads. By this, however, I mean not to be understood as intimating that any such block is part of the realty. On the principle, then, that a thing temporarily severed from the freehold does not cease to belong to it, the whole set must be considered a part of the mill. Some two or

three of these rolls, however, were duplicates; but all of them had at one time or another been in actual operation, and it is impossible to say which were the proper members of the set, and which the supernumeraries. But even if that could be told, all might, nevertheless, be deemed a part of the mill, seeing that they are often broken and can not be instantly replaced if they are not kept ready on hand. Duplicates necessary and proper for an emergency, consequently follow the realty on the principle by which duplicate keys of a banking house, or the toll-dishes of a mill follow it.

We are of opinion, therefore, that the rolls in question passed as a part of the freehold by the mortgage and sale on the *levari fucias*; but that if they had not passed they could not have been sold as chattels on the plaintiff's *feri facias* against the mortgagor; and were it necessary we would further hold that they might have passed, had they been chattels, by force of the word apparatus in the description of the premises. On all these points the case is with the defendant.

Judgment affirmed.

ROBERTS V. THE DAUPHIN DEPOSIT BANK.

(19 Pennsylvania State, 71. Supreme Court, 1852.)

Steam engine and boilers. A steam engine and boilers fixed in an anthracite furnace for the manufacture of iron are part of the realty.

Replevin. A writ of replevin is effectual for the delivery of personal property only; it furnishes no justification to an officer who under it seizes and delivers such engine and boilers, a part of the realty.

¹ **Fixtures feed the mortgage.** Though such engine and boilers were put up after the mortgage to the plaintiff was given, they constituted parcel of the mortgage security and were not liable to removal by the mortgagor or her assigns, if such removal was injurious to the mortgagee, who has a right to benefit from any appreciation of the mortgaged premises arising from any cause.

Action on the case by mortgagee, for removal. Where the mortgagor is insolvent and a second mortgagee has been injured by the removal of the fixtures, he may maintain an action on the case against the parties removing the property.

¹ *Pierce v. George*, 108 Mass. 78; 11 Am. R. 310.

Error to the Common Pleas of Dauphin County.

This was an action on the case brought by the Dauphin Deposit Bank against Anthony E. Roberts and Henry M. Bayard. The summons issued April 17, 1851, and was served on A. E. Roberts the next day, in the city of Philadelphia, by the sheriff of Dauphin county; which service the court below refused to quash or set aside, and this was, *inter alia*, assigned as error. The service was made under the act of 14th April, 1851. (See Acts, p. 612.)

On the 15th April, 1847, the sheriff of Dauphin county, by deed duly acknowledged, conveyed to Ann C. Bayard, in fee simple, a tract of land in said county, comprising two adjoining tracts of 100 and 99 $\frac{1}{4}$ acres, respectively, on the first of which was an anthracite blast furnace for the manufacture of iron, called, "The Emiline Furnace," propelled by water. The first tract was subject to a mortgage given by John C. Sims, a former owner, to Wm. Cochran, administrator of John Hatfield, for \$2,699.16 $\frac{1}{2}$, dated 24th March, 1834, and recorded the same day. The other tract was subject to a mortgage to Daniel W. Gross, administrator of Abraham Gross, deceased, for \$6,000, payable in installments from 1838 to 1842, dated and recorded 30th March, 1837.

Both these mortgages are still unsatisfied, and liens on the land.

On the 29th April, 1847, Ann C. Bayard executed and delivered her bond to the Dauphin Deposit Bank, plaintiffs in this action, for \$7,200, payable in one year, with interest, secured by a mortgage of same date on the above named "Emiline Furnace estate," of 200 acres (comprising the two tracts above mentioned), as conveyed to her by the sheriff.

By a collateral agreement of the same date, the bank agreed that if the interest on said mortgage were paid half yearly, on the first of April and October, or in the space of thirty days thereafter, the principal thereof should not be payable until October 1, 1850, "and if the said Ann C. Bayard, her heirs or assigns, shall well and truly make the payments of interest of the said debt semi-annually, and pay the principal thereof on the said first day of October, A. D. 1850 according to the terms prescribed in the foregoing agreement,

without failing or making default as aforesaid, the said bank will stay all proceedings on the said bond and mortgage of the said Ann C. Bayard, till the said first day of October, A. D. 1850, or such default shall be made."

The interest was so paid by A. C. Bayard, the last payment being made by her to the bank on the 30th April, 1850, in full to the 1st April, 1850.

In 1849, Ann C. Bayard, being still the owner of the tract and in possession, placed thereon a steam engine, boilers, bellows, receiver, etc., which was attached to bedplates in the wall of the furnace by bolts kept in their places by iron nuts screwed on them. This engine was used about three months in blowing the furnace, until the stack of the furnace fell down, and the blast was thereby interrupted, and the furnace was afterward abandoned. An engine house was put over this engine after it was put up.

On the 29th of April, 1850, Ann C. Bayard, being still the owner of the land and in possession thereof, conveyed by bill of sale to Richard H. Bayard (a judgment creditor of hers to the amount of \$16,550) for the consideration of \$5,900, the said steam engine, boilers, bellows and other machinery connected therewith.

On the 16th May, 1850, Richard H. Bayard, by authority from Ann C. Bayard, began removing said engine and machinery. His agent unscrewed all the bolts that fastened the engine to its bed, took off the nuts, took out the connecting shaft between the engine and cylinder and the bolts of the cylinder, and took off the pipe connecting the boilers to the engine, and such small parts of the engine as three men could lift, and loosened it from its foundation; and was engaged in taking down the wall on which the boilers rested, when a writ of estrepement at the suit of the bank was served by the sheriff and the parties desisted.

Evidence of the insolvency of Miss Bayard in or about the autumn of 1850, was given (under exception) by the plaintiffs.

On the 14th September, 1850, Richard H. Bayard, by bill of sale for the consideration of \$5,000, conveyed said steam engine, boilers, bellows and machinery to Joshua E. Driver of the State of Delaware.

On the 16th September, 1850, Joshua E. Driver issued from the Circuit Court of the United States for the Eastern District of Pennsylvania, a writ of replevin against said Ann C. Bayard, "for a steam engine, and boilers, blowing apparatus, bellows and receiver, etc., valued at \$5,000, now at Emiline Furnace in the county of Dauphin." This writ was the same day delivered to the defendant, Anthony E. Roberts, then marshal of the United States for said district, whose deputy, charged with the execution of said writ, arrived at the above named furnace the next morning (17th September, 1850), served the writ on the man in charge of the engine house where the engine was placed, got the key of the house from him and took possession of the house and engine, and then commenced removing the engine by taking out some of the bolts on the steam chest of the engine, the nuts of which had previously been taken off, preparatory to its removal, and remained in possession until the engine was removed.

On the 18th September, 1850, the Dauphin Deposit Bank issued an ejectment against Ann C. Bayard and Joseph Feidt to collect the amount of the mortgage which was served on the deputy and returned "*nihil*" as to Ann C. Bayard; nothing further was done in this suit. On the same day they obtained a writ of estrepement from the Court of Common Pleas of Dauphin county, directed to A. E. Roberts, Joshua E. Driver and Samuel Halzell, commanding them not to remove the engine. This was served on Roberts on the 20th, together with a written notice from the attorney for the bank, notifying him that he would be held responsible if he removed the engine, as it was part of the freehold on which the bank had a mortgage.

At the time of issuing these estrepements and ejectment, no interest was due by Miss Bayard to the bank.

Mr. Roberts proceeded in the execution of the replevin, removed the engine from the furnace and delivered it to Driver, the plaintiff, and on the 12th November, made return of the replevin as follows:

"I have caused to be replevied and delivered unto Joshua E. Driver, the plaintiff within named, the steam engine and all the other apparatus within described, except the receiver. So answers:

A. E. ROBERTS, Marshal."

On the same day a *harr.* in replevin and rule to plead were filed, and on the 26th December, 1850, judgment for want of a plea was duly entered in said suit against the defendant, A. C. Bayard.

In October, 1850, the Dauphin Deposit Bank issued a *scieri facias*, on their mortgage, against Ann C. Bayard, and obtained judgment by confession for \$7,200, and interest from October 1, 1850. A *levari facias* then issued under which the "Emiline Furnace estate" above mentioned was sold by the sheriff of Dauphin county to the bank, for \$100, and a sheriff's deed made and duly acknowledged to them on the 25th of November, 1850.

In the case trying, some evidence was given by plaintiffs that the land, furnace, etc., in the fall of 1850, was worth from \$7,000 to \$8,000, and in 1847 was worth from \$3,000 to \$12,000, having diminished through the depreciation of the iron business, the carrying away of the dam by a freshet, etc.

Under these facts and the charge of the court, the jury rendered a verdict for the bank, the plaintiff, for \$5,300.

On the trial, points as follows were presented on the part of defendants.

1. The plaintiffs can not sustain this action against defendant Roberts, as they had at the time of the removal of the engine, etc., no interest in the Emiline Furnace property but that of second mortgagees.

2. If Ann C. Bayard placed the engine on the land after she gave the mortgage to the plaintiffs, she had the right of selling or removing it prior to the sheriff's sale.

3. Her sale of it to Richard H. Bayard, and the taking possession of it by Rogers as his agent, and removal of the fastenings (if believed), constituted it personal property.

4. If, after this, it was transferred by R. H. Bayard to Driver, and the defendant Roberts took it by virtue of a writ of replevin at Driver's suit, he is protected and the verdict must be in his favor.

5. If Roberts or his deputies took possession of the engine under the replevin, before the writ of estrepement of September was served on him, he was not bound to desist therefrom.

6. If the jury believe that the engine gave no additional

value to the property in November, 1850, the verdict must be for defendants.

PEARSON, J., answered as follows:

1. This action can be sustained as well by a second as a first mortgagee: 12 New. Hamp. 558. The mortgage, accompanied with the writ of estrepement, gave the mortgagee such an interest as will enable it to maintain an action, if the jury believe the engine, etc., remained a fixture at the time the writ of estrepement was served on the marshal. This is the proper form of action.

2. There is no additional right in a mortgagor to remove fixtures because erected after the mortgage was given: 2 Greenleaf's Reports, 132; Coote on Mortgages, 351.

3. Whether any portion of the property was so far severed by the act of Mr. Bayard before the writ of estrepement was served on him in May, 1850, is a question for the jury, depending on the principles stated relative to the removal of fixtures, and severing them from the freehold.

4 and 5. If the severance of the fixtures from the freehold was perfect in May, 1850, the replevin could lawfully issue, and if the marshal under his writ seized the property before the writ of estrepement issued and was served on him, he could lawfully proceed to remove the articles from the premises, and the action can not be sustained. But if the engine and other fixtures were a part of the freehold when the marshal went on with his writ of replevin, the articles were not the subject of such a proceeding; and if the plaintiff brought its ejectment on account of the attempted waste, and had the writ of estrepement issued to prevent it, and served on the marshal before his severance of the same from the freehold, he was bound to desist, and is subject to an action for proceeding to the injury of the plaintiff, against the mandate of the writ of estrepement.

6. The law is as stated in this point. If the mortgaged premises would bring no more with than without these fixtures, the plaintiff has sustained no damages, and can not recover. The right of recovery depends on substantial injury.

Verdict was rendered for the plaintiff for \$5,300.

Various errors were assigned; for the more important ones see the opinion of LOWRIE, J.

J. P. MONTGOMERY and FISHER, for plaintiffs in error.

KUNKEL and MCCORMICK, for defendant in error.

The opinion of the court, filed July 20, was delivered by LOWRIE, J.

The bank was mortgagee of certain land of Ann C. Bayard, on which was a furnace for the manufacture of iron, which was worked by means of a steam engine, boilers, blowing apparatus, bellows, receiver, etc., erected by the owner of the land. She sold the engine and machinery to her brother, Richard H. Bayard, who sold the same to Joshua E. Driver, who issued a replevin out of the Circuit Court of the United States, and thereupon A. E. Roberts, the marshal, took and carried away the engine and machinery. The marshal in the United States courts occupies the same position as a sheriff does in our State courts, and his writ furnishes him the same protection. But a writ of replevin is effectual for the delivery of personal property only; and it furnishes no justification to an officer who, under it, severs and delivers part of the realty. This engine, with its appurtenances, was part of the realty, unless Ann C. Bayard had a right, as against her mortgagee, to treat them as personal property, which, under ordinary circumstances, she had not.

It is insisted, however, that because the engine, etc., were put up after the giving of the mortgage, therefore they constitute no part of the mortgage security, and might be removed without doing any wrong to the mortgagee. But this is not so. As the mortgagee may suffer by the depreciation of the property arising from fluctuations in value, from accident and from neglect, so he may be benefited by its appreciation, whether the same arises from the proper cultivation and improvement of the property, or from any other cause. No other rule could be at all practical.

It further insisted that Richard H. Bayard, after his purchase and before the issue of the replevin, had severed the engine and machinery from the freehold, and that the replevin was executed after the property was severed, and without notice of the claim of the mortgagee. But we can draw no in-

ference from this proposition because the jury have negatived all the facts assumed in it.

We do not perceive that this case has, or was treated as having any proper connection with the various proceedings against Aun C. Bayard in the Common Pleas of Dauphin, including the action and writs of estrepement on the plaintiff's mortgage. The sheriff did not properly execute those writs; but to avoid an indecent conflict of authorities, suffered the defendants to remove the property. That remedy thereby became ineffectual, and the present action is brought as a substitute. The writs of estrepement may therefore be of no value here, but as means of proving that the defendants below were fully warned of the plaintiff's claim, and perhaps in aggravation of the damages.

It is said that the court below erred in their charge as to damages. But wherein the error consists we are not informed, and we do not choose to guess. This objection is therefore dismissed, as being entirely too general. We feel sure, however, that the defendants did not suffer injustice from the instructions of the court. The plaintiff's mortgage was for \$7,200, and on a sale under it, the land, after the removal of the engine, etc., brought but \$100, charged with a prior mortgage; and thus it appears that the waste injured the second mortgage alone. In issuing the replevin, the engine, etc., were valued at \$5,000; the witnesses all place a higher estimate on them, and the jury have assessed the damages at \$5,300. Surely this verdict is not too high. But if this were doubtful, the spoilers, and not the righteous creditor, should bear the consequences of the doubt raised by themselves.

It is somewhat strange that the only exceptions to evidence are founded upon offers to prove the very allegations of the declaration. If the defendants did not wish to hear these proved, they should have demurred to the count which contains them. In some cases there are allegations which are merely formal, which need not and should not be proved, but such is not the case in this instance.

But it is insisted that the bank had no such interest in the property as to entitle it to this action, having no title but as second mortgagees. Yet the declaration alleges, and the jury have found that the mortgagor is insolvent, and that by the

defendants' act, the plaintiff's mortgage is rendered almost entirely valueless. It is of the very nature of the action on the case that it is adapted as a remedy for all legal wrongs, for redress of which the other forms of action are not applicable. And the argument of the defendant in error is perfectly legitimate in this State, that the fact that an injunction lies to prevent such an act, 2 Johns. Ch. R. 128, proves that it is regarded by the law as an injury. And our law granting an estrepement in such a case as this, proves the same thing. Besides this the property was mortgaged or pawned to the plaintiff, and an injury to the thing pawned is a wrong done to the pawnee, if thereby he loses his claim or any part of it; and though the number of previous mortgagees may increase the difficulty of proving that the plaintiff was injured, yet this furnishes no bar in favor of a wrong-doer. The plaintiff had such an interest and was entitled to protection.

Judgment affirmed.

MERRITT ET AL. V. JUDD ET AL.

(14 California, 59. Supreme Court, 1859.)

¹ Fixture defined. Various definitions of "a fixture" reviewed. It is agreed to be "an article of a personal nature affixed to the freehold."

A claim is a title. Claims located on the public lands are recognized, practically, as titles: recognized by courts as legal estates of freehold except as to doctrine of abandonment.

Pump, boiler and engine are removable trade fixtures. A steam engine, boiler and pump, bedded into the ledge sufficiently to get a level covered by a shed for shelter, and used in working a mine, are fixtures, of that class known as trade fixtures, removable by the tenant during term, or so long as he holds under *a right still to consider himself a tenant.*

Right of removal subject to special contract. The right of removal is subject to the agreement of the parties, or may be controlled by local usage.

Improvements. Such machinery as above described is included by the term improvement.

Subsequent contract, without merger. When the lease stipulated that the improvements were to go to the lessor on forfeiture, the lessor's right is not lessened by his giving a title bond for the conveyance of the fixtures, with the terms or payments of which the lessee failed to comply.

¹ *Prescott v. Wells*, 6 M. R. 89.

¹ **Renewal.** The renewal of a lease destroys the lessee's right to remove fixtures.

Law of fixtures affected by the relation of the parties. A deed or mortgage carries fixtures as parcel of the freehold where, as between lessor and lessee, the lessee would be entitled to remove them.

² **Title bond.** A title bond is in effect a mortgage; the legal title remains in the vendor with an equity in the vendee to have the title to the whole estate, including fixtures, on compliance with the conditions.

Appeal from the Fourteenth District.

The facts are sufficiently stated in the opinion. The court below, on motion for nonsuit, and during the trial, made rulings upon the doctrine of fixtures, the opposite of the results reached by this court, and it is not necessary to repeat them. The jury, under instructions, found for plaintiff. Defendants appeal.

F. J. DUNN, for appellants.

McCONNELL & MILES, for respondents.

BALDWIN, J., delivered the opinion of the court, TERRY, C. J., concurring.

Replevin for a small steam engine and pump.

This case has been argued with a research and ability highly creditable to the counsel, the more especially as their labors and arguments are of a value somewhat disproportioned to that of the matter of litigation which has elicited them. The facts, as stated by respondents, are as follows: R. S. Whigham, the plaintiffs' predecessor in interest, leased a quartz ledge of the defendant, Byrne. During the lease, Whigham placed the engine and pump upon the ledge, where it was used to pump water from the shaft, and to raise the quartz rock to the surface. The lease expired on the 1st of September, 1856, and on the next day Byrne gave to Whigham a bond for a deed on certain payments to be thereafter made by Whigham. Whigham continued in possession under this contract. On the 1st of January afterward, Whigham, being still in possession of the ledge, sold the pump and engine, together with other property, to Redick McKee, and gave him possession, with the knowledge of Byrne. Mc-

¹ *Loughran v. Ross*, 45 N. Y. 792; 6 Am. R. 173; *Watriss v. Cambridge Bank*, 124 Mass. 571.

² *Walker v. Tiffin Co.*, 2 Colo. 89; *Post MORTGAGE*.

Kee worked the ledge under Whigham, and from that time it lay idle, the quartz not paying.

Some time after the sale by Whigham to McKee, Byrne entered and took possession of the pump and engine, and removed them, under protest by McKee's agent. He then leased them to defendant, Judd, who was also present and took part in the removal of the property, and was then notified of the claim of McKee. At the time of the commencement of the suit, the engine and pump were in possession of Judd, under this lease from Byrne.

Whigham failed to comply fully with the conditions of his purchase of the lead, having made part payments only of the purchase money.

The engine and pump were attached in the following manner: Two timbers ten or twelve feet long, and from two feet to thirty inches in diameter, were placed side by side upon the ground; they were only bedded in the ground sufficiently to make them level. On these bed timbers were placed a frame of four timbers, each about eight inches in diameter, the side timbers about seven feet long, and the end ones about three feet. These frame timbers were bolted or spiked together, and bolted or spiked to the bed logs. The boiler of the engine was spiked or bolted to this frame. The engine rested on the frame beside the boiler. The boiler, engine and pump were attached together by the usual connections, the pump itself extending into the shaft. Over the whole was a roof or shed, which was constructed merely for the protection or shelter of the machinery. The machinery was not attached to the building in any way, except that the pump was stayed by rods reaching to the rafters of the roof.

McKee sold the pump and engine to the plaintiffs.

The quartz lead was upon the public lands, and was within the limits of a pre-emption claim owned by Whigham.

The main question raised by this state of facts is, was this property a fixture in the common law sense; and if so, had the plaintiffs, the tenants, a right to remove it? and this question depends upon two inquiries: 1, whether there can be a fixture on public land; and 2, whether, if there can be, the particular facts here constitute the property such, and give the right of removal claimed by respondents?

1. It is contended by the counsel for the respondents, that there can be no such thing as a fixture upon public land.

Fixtures are variously defined, though the writers substantially agree at this day in the general definition. Kent defines it to be "an article of a personal nature affixed to the freehold." (2 Com. 344.) In Smith's Leading Cases (vol. 2, p. 296) an elaborate essay is found upon the subject. The author, after criticising the definition given in several English cases, says: "It seems better, therefore, for the purposes of this note, to use the word 'fixture' in that which appears to be its natural and most obvious sense, viz.: anything annexed to the freehold. By the expression, 'annexed to the freehold,' is meant, fastened to or connected with it; mere juxtaposition, or the laying of an object, however heavy, on the freehold, does not amount to annexation."

We are not disposed to agree with this first proposition of the counsel. From an early period of our State jurisprudence we have regarded these claims to public mineral lands as titles. They are so practically. It is very evident that the government will not change its policy in respect to them—that they will not be sold, nor the present tenure altered. Our courts have given them the recognition of legal estates of freehold, and so, to all practical purposes—if we except some doctrine of abandonment, not, perhaps, applicable to such estates—unquestionably they are, and we think it would not be in harmony with this general judicial system to deny to them the incidents of freehold estates in respect to this matter. If to decide thus be a departure from some technical rules of law, it is but following other rules, which hold that a system of decisions, long established and long acted upon, shall not be departed from when important rights have vested under it, merely because the reasons upon which it rests might not, in the judgment of subsequent judges, be considered sound. We can see no difference in respect to the principle between a house built upon public land and a fixture; the reason which makes the one a part of the inheritance, applies to the other, and it is only by denying to the vendee, or *quasi* owner, the character of owner, that the legal conclusion can be escaped, that the title to the land, whatever it is, carries with it the title to the structures annexed to the soil.

2. We come to consider the next question, whether the property as we have described it, was a part of the freehold. It must be annexed to the soil. Thus, in the case of *Culling v. Tuffnall* (Buller's N. P. 34), where a tenant had erected a barn on pattens and blocks of timbers lying on the ground but not fixed in or to the ground, it was held he might take them away at the end of his term. The author of Smith's Leading Cases, after reviewing a number of precedents, says: "The general rule is, that to constitute an article a fixture—i. e., a part of the realty—it must be actually annexed thereto, and, *e converso*, whatever is so annexed becomes part of the realty, and the person who was the owner of it when a chattel, loses his property in it, which immediately vests in the owner of the soil." The authorities make a distinction in this right of removal, as between persons differently related—that is, as between heir and executor, between executor and remainder man, and between landlord and tenant. As, however, this question is rested here on this last relation, we need not consider the rules governing the others. The author (Smith) says, that "the general rule governing this subject is, that the tenant, if he have annexed anything to the freehold during his term, can not again remove it without the consent of his landlord." (Co. Lit. 53 a.) After the passage of the statute of Gloucester (for the punishment of waste by the tenant), it was held that a lessee engaged in trade, and who had set up fixtures for carrying it on advantageously, had, in some cases, a right to remove them at the expiration of the term. This was, at length, firmly settled in *Poole's Case* (1 Salk. 368), and has been since supported by many cases. The benefit of this rule was applied to a fire engine, erected under a shed, and which could not be removed without considerable injury to the freehold, to a shed built on brick work (1 H. Black. 258), and to posts and rails.

Upon few subjects have there been more numerous or more diverse decisions than upon this question of fixtures. Though no great difficulty appears at first sight in the definition itself, yet the application to particular facts has vexed the courts and given rise to an endless conflict of decision. This subject is reviewed by Mr. Justice COWEN, in the case of

Walker v. Sherman, 20 Wend. 638, in his usual exhaustive style. The learned judge draws the distinction between the rights of landlord and tenant, and grantor and grantee—to which we shall have occasion to advert hereafter. Among the cases reviewed is that of the *Olympic Theatre*, 2 Browne, 285, in which the court say: "The general rule appears to be, that where the instrument or utensil is an accessory to anything of a personal nature, as to the carrying on a trade, it is considered a chattel; but where it is a necessary accessory to the enjoyment of the inheritance, it is to be considered as a part of the inheritance."

LORD MANSFIELD took a similar view of the question in *Lawton v. Salmon*, 1 H. B. 259. "The present case," said he, "is very strong. The salt spring is a valuable inheritance; but no profit arises from it unless there is a salt work, which consists of a building for the purpose of containing the pans, which are fixed to the ground. The inheritance can not be enjoyed without them. They are accessories necessary to the use and enjoyment of the principal. The owner erected them for the benefit of the inheritance." These salt pans were very slightly fixed with mortar to the floor, and might be removed without injuring the building. The same eminent judge held that a steelyard hung in a machine-house was a fixture (*Rex v. Inh. of St. Nicholas*, Gloucester, 262): "The principal purpose of the house was for weighing." DANE, in the third volume of his Abridgment, 156, says the articles referred to before "are very properly a part of the real estate and inheritance, and pass with it, because not the mere fixing and fastening to it is alone to be regarded, but the use, nature and intention." MR. JUSTICE WESTON delivered an opinion in *Farrar v. Stackpole*, 6 Greenl. 157, which MR. C. J. GIBSON, of Pennsylvania, strongly commends. Judge WESTON says: "The genius and enterprise of the last half century has been in nothing more remarkable in the employment of some of the great agents of nature, by means of machinery, to an infinite variety of purposes for the saving of human labor. Hence, there has arisen in our country a multitude of establishments for working in cotton, wool, wood, iron and marble; some under the denomination of mills, and others of factories, propelled

generally by water-power, but sometimes by steam. These establishments have, in many instances, perhaps in most, acquired a general name, which is understood to embrace all these essential parts; not only the building which shelters, incloses and secures the machinery, but the machinery itself. Much of it might be easily detached, without injury to the remaining parts, or to the building, but it would be a very narrow construction, which should exclude it from passing by the general name by which the establishment is known, whether of mill or factory. The general principle of law must be applied to new kinds of property, as they spring into existence in the progress of society, according to their nature and incidents, and the common sense of the community. The law will take notice of the mutations of language, and of the meaning of new terms, applied to new subjects, as they arise. In others words, it will understand words used by parties in their contracts, whether executed or executory, whether in relation to real or personal estate, according to their ordinary meaning or acceptance."

The same principle is held and enforced with great power, by C. J. GIBSON, in the case of *Voorhis v. Freeman*, 2 Watts & Serg. 116, a case entitled to the more consideration from the frank acknowledgment made of the error of a previous contrary decision of the Supreme Court of Pennsylvania, in which that eminent jurist participated.

Mr. Justice COWEN, after reviewing a multitude of authorities, English and American, reaches this conclusion:

"On the whole, I collect from the cases cited, and others, that as a general rule, in order to come within the operation of a deed conveying the freehold, whether by metes and bounds of a plantation, farm, or lot, etc., or in terms denoting a mill or factory, etc., nothing in a nature personal in itself will pass, unless it be brought within the denomination of a fixture by being in some way permanently, at least habitually, attached to the land or some building on it. It need not be constantly fastened. It need not be so fixed that detaching will disturb the earth or any part of the building. I am not prepared to deny that a machine movable in itself, would become a fixture from being connected in its operations by bands, or in any other way, with the

permanent machinery, though it might be detached and restored to its ordinary place as easily as the chain in *Farrar v. Stackpole*."

We think that the principle to be extracted from the modern cases covers the case at bar; that this apparatus was necessary to the working of the ledge; that it was attached for that purpose permanently to the soil, and its use accessory, if not essential to the inheritance for its only valuable purpose—the extraction of the gold. Many cases are cited in the books, in which a similar, or not more intimate and secure connection with the freehold, has been held a sufficient annexation. Some cases have been noticed already. See, further, *Ferris v. Walker*, 1 Bailey, S. C., where a cotton gin attached to the gears in a gin house upon a cotton plantation, was held a fixture passing with the land. See also, to the same effect, *McDaniel v. Moody*, 3 Stew. 314. A steam engine, with its fixtures, used to drive a bark mill and pounders: *Oves v. Ogelsby*, 7 Watts, 106; *Voorhis v. Freeman*, 2 Watts & S. 116; Id. 390; 7 Blackf. 469. Iron stores fixed to the brickwork of the chimneys of a house: 7 Mass. 482; gravestones erected: 4 N. H. 415; the mill chain, elogs, and bars, being in their appropriate places at the time of conveyance, pass with a saw mill and appurtenances: *Farrar v. Stackpole*, 6 Greenl. 154. See, also, for similar examples, *Union Bank v. Emerson*, 15 Mass. 159; *Dispatch Line v. Bellamey*, 12 N. H. 233; *Noble v. Bosworth*, 19 Pick. 314; 3 Mason, 459; 4 Watts, 330; 2 Dev. 376; 3 Missouri, 307; 5 Cow. 323.

The respondents' counsel insists that after the expiration of the lease, the tenant may remove the fixtures, and cites two authorities: 20 Johns. 29, and *Pemberton v. King*, 2 Dev., N. C., 376. But in the first case the question did not arise, for the cider mill in controversy there was held to be no fixture at all. We have not had access to 2 Dev., it not being in the library; but, if the doctrine there be as stated, it is directly opposed to an overwhelming weight of authority. See *The State v. Elliott*, 11 N. H. 542; 2 Kent's Com. 346; *Lee v. Risdon*, 7 Taunt. 188; *Lyde v. Russell*, 1 Barn. & Adol. 394, beforecited; *White v. Arndt*, 1 Whart. 91; *Gaffield v. Hapgood*, 17 Pick. 192; *Shepard v. Paulding*, 4 Met. 416; Chitty on Con. 322; *Fitzherbert v. Shaw*, 1 H. Bl. 258, all of which maintain the contrary doctrine.

It is observed in the review by the learned editor of the Leading Cases that, to whatever extent the right to remove trade fixtures be carried, common sense and justice seem to require that it should be bounded by the rule laid down by Lord HARDWICK in *Lawton v. Lawton*, that the principal thing shall not be destroyed by the accessory. The authorities seem to be divided as to the right of a farmer to remove fixtures annexed to the soil, and put there for agricultural purposes; but in several cases it is held that when the tenant's business is in the nature of a trade (as in 3 East, which involved the right to a cider mill), the same rule held. But the right in respect to these fixtures, it seems to be conceded, is less broad than the right to trading fixtures. However, this makes no difference here, for we consider this sort of property—being movable in its nature—when applied to quartz leads, is really used in trade—the trade of getting out the gold—or as accessory to that business. We can see no distinction in this respect between this sort of property used for this business and the same property used for the purpose of a colliery.

Though this property, according to the cases cited, was a fixture, still it was removable by the tenant, if he were otherwise entitled to remove it. To this conclusion, however, the objection just noticed is interposed, that there is no right of removal except during the tenancy; and that this had ceased at the time of the severance and removal. In *Penton v. Robart*, 2 East, 88, Lord KENYON stated the rule to be, that, after the termination of the lease, the tenant, *if he remained in possession*, had a right to take away fixtures, which he might have removed during his term. The reason is stated: "He was, in fact, still in possession of the premises at the time when the things were taken away, and, therefore, there is no pretense to say that he had abandoned his right to them." If the fact of leaving the premises be only important as proving abandonment, and the forfeiture of the right to the fixtures depends upon the presumed abandonment, it would seem that the retention of the premises by the tenant, although a considerable period may have elapsed after the termination of the lease, would preserve his right. But this doctrine seems qualified in a subsequent case of *Weston v. Woodcock*, in which ALDERSON, B., said: "The

rule to be collected from the several cases decided on this subject seems to be this, that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds *the premises under a right still to consider himself a tenant*," and we have seen that beyond this the great weight of authority does not go.

It has been seen that the lease is evidenced by an article of agreement dated the 21st of April, 1856. It leases to Whigham the ledge for three months, commencing on the first day of June, and ending on the first day of September, for three hundred dollars per month. On failure to pay the rental as provided (six days grace being given), the lessee to forfeit all improvements on the ground. Lessee binds himself to work the ledge in a good and workmanlike manner for the term. The article then provides that the lessee, on the expiration of the lease, shall have the privilege of buying the property on certain terms and conditions, after the expiration of the lease. "If the party of the second part does not see proper to purchase at the expiration of his lease, then he shall deliver up said premises, with improvements on the ground, or that may be put on the ground, for working the lead, peaceably to the said Byrne, his heirs, or assigns."

It has been seen that the lessee did purchase. The paper evidencing this fact is in form a bond, under a penalty of ten thousand dollars. The condition of the bond recites that, whereas, the obligor has sold to Whigham the lead, etc., for five thousand dollars: One thousand dollars, 10th October, 1856; two thousand dollars, 20th December, 1856; two thousand dollars, 1st February, 1857; upon which payments, well and truly to be made in manner and form aforesaid, he binds himself to make a title, etc., to the ledge, and every part thereof and every right thereto.

It is admitted that the purchase money was not paid; and it seems that the plaintiff did not himself retain the possession, nor did his vendee, but that some time before the removal of this property the defendant resumed the possession and leased it to other parties, who also occupied and subsequently abandoned the premises.

Whatever may be the right of the tenant by mere force of his relation and the law to remove a fixture, there is no doubt

that this right may be regulated by the agreement or undertaking of the parties. So it is laid down in the *Leading Cases*, 212, and *Naylor v. Collinge*, 1 Taunt. 19; *Perry v. Brown*, 2 Stark. 403; *Thresher v. East London Water Works Co.*, 2 B. & C. 608; *Earl of Mansfield v. Blackburne*, 6 Bing. N. C. 426; and several other cases are cited and maintain the principle. The author intimates that a stipulation may be created by implication from the custom of a particular district. In *Fairburn v. Eastwood*, 6 Meeson & W. 679, the lease contained a covenant that the fixtures should be valued to the landlord at the end of the tenancy. The tenant became bankrupt, and the landlord, to whom the premises had been given up, refused to pay the amount of the valuation to the assignees; it was held they might maintain trover for the fixtures. The case appears to have proceeded on the principle that, as the landlord, by the terms of the covenant, was entitled to the possession of the fixtures, on condition of his paying for them, it would have been inconsistent with the stipulation to hold that he could retain them after breaking that condition. That case was, therefore, one in which the ordinary rule was qualified by express agreement.

West v. Blakeway, 2 Mann. & G. 729, side, is a case interpreting the words "erection and improvements" in a lease. It was held, among other things, that a green-house was included in the term "improvement," and that the covenant was broken by the removal by the tenant of the sashes and framework of the green-house, erected during the term, the framework of which was laid upon walls built for the purpose of receiving it, and embedded in mortar thereon.

We can not doubt that the improvements mentioned in the lease include this property; the "improvements that may be put up on the ground for working the lead," seem to have direct reference—they certainly include—this machinery, thus fixed in, or to, the soil.

It has been seen that the lease stipulates that these shall go to the lessor on the termination of the lease, if the rent was not paid; also, that if the lessee declined to purchase, the same effect was to follow. Could it have been intended if he failed to pay, if he only went through the form of a contract to pay, the lessor's rights would be less? Was that the agreement?

4. But another principle comes into the case here. It was held in *Fitzherbert v. Shaw*, 1 H. B. 258, that where the lease is renewed, the lessor's right to carry away the fixtures is gone. Upon the execution of the new lease, he is in the same situation as if the landlord, being seized of the land, had leased both land and fixtures to him. Nor does this doctrine apply only to a lease, but to other agreements which terminate a possession under it. *Lyde v. Russell*, 1 Barn. & Adol. 394 is a leading case, and is said to have been very maturely considered by Lord TENDERDEN. The case was trover for bells, pulls, cranks, wires, etc. The doctrine was held that the tenant must remove the fixtures during the continuance of the term, and not having done so, they belonged to the landlord. The landlord, after the tenant had quitted, severed these fixtures from the freehold, and converted them into chattels. Chitty on Cont. 316, says: "With respect to the transfer of fixtures, it appears to be a rule that upon the conveyance of lands and houses, purchased in general terms, personal chattels attached thereto are impliedly included, although such chattels might otherwise be taken away under the law of fixtures, and that the grantee can not, after such general conveyance, insist on a valuation of the fixtures. 2 B. & C. 6; 3 D. & R. 355 are cited by the author. And so, where a lease is renewed, containing the general terms "land," "buildings," "erections," etc., fixtures are included as part of the demise, and the tenant can not afterward remove them, whatever may have been his right before the new lease was granted: *Thresher v. East London Water Works Co.*, 2 B. & C. 608; S. C. 4 D. & R. 62.

In 2 Sandf. Ch. 364, the distinction is recognized between the right of lessee and that of a mortgagor. Although, says the court, the lessor of the land could not claim the fixtures, it is otherwise of the mortgagee of the lessees. The question here is between grantor and grantee, in which case the grantee holds all fixtures, whether for trade or manufacture, or for the purposes of agriculture or habitation, and *Walker v. Sherman*, 20 Wend. 636 and the authorities there cited, are referred to as sustaining, and they do sustain fully, the proposition.

There is no doubt that, under a general deed of mortgage,

or bargain and sale, the fixtures pass as a part of the freehold. In *Winslow v. Merchants Insurance Co.*, 4 Met. 306, it is held that, as between the mortgagor and mortgagee, fixtures for trade can not be removed by mortgagor, though put up by mortgagor after the execution of the mortgage.

Applying these principles to the case at bar: If the lessee had renewed his lease, he would not have been entitled to remove the improvements. Is he in any better situation under this executory contract of sale? And this brings us to inquire, what is the nature of the contract? It did not vest a title, that is certain; for it only stipulated for a title on a certain condition and in a given event. It is what is called in other States a bond for title. These instruments have been often construed. They are in effect mortgages at common law. The legal title is retained by the vendor, and an equity vests in the vendee to have the legal title, on compliance with the conditions. This legal title is to the whole estate, including the fixtures, and this equity is to the same extent. The vendor can go into equity to foreclose, or he can bring ejectment on breach of condition: See 5 Port. 452, and cases therein; also, 5 S. & M. Miss. R. 594; 4 John. Ch. 559; 5 Id., 193; 1 Id., 370.

But we have already seen that a new agreement in respect to the premises, by the lessee, destroys his right to the fixtures. (See cases before cited.) The lease was terminated long before the removal of this property, and after an abandonment of the premises after there was an entry, and a right of entry by the landlord who held the legal title; and within the case of *Lyde v. Russell*, before cited, this right to remove was gone, and the title from these latter facts alone vested in the owner of the estate.

These views lead us to the conclusion that the court below erred in its rulings both on the motion for nonsuit and on the trial.

Judgment reversed and cause remanded.

DUKE OF BEAUFORT V. BATES.

(3 De Gex Fisher & Jones, 381. High Court of Chancery, 1862.)

¹ **Tramways.** Coal and iron works were demised along with mines, with liberty to lessees to make "roads and ways." The lessees covenanted *inter alia* to uphold and keep in good repair the "works" and at end of term to deliver up the property and "all ways and roads in, upon or under" the same, in such good order that the works might be continued by the lessor. *Held*, that this covenant did not extend to trams fastened to sleepers not affixed to the freehold, which the tenant had placed upon roads for the purpose of treating them as tramways; and that, therefore, the landlord was not entitled to an injunction to restrain the tenant from disposing of them during the term.

Works, roads and ways. Neither of the terms, works, roads or ways, cover a temporary tramway not affixed to the freehold.

This was a motion to discharge an order of Vice-Chancellor STUART, granting an injunction to restrain the defendant, who was a judgment creditor of an under-lessee, from removing certain tram-plates and sleepers from property of which the plaintiffs were the lessors.

In 1801, the then Duke of Beaufort demised to Edward Kendall and Jonathan Kendall, for seventy-seven years, a furnace for smelting iron in the other buildings and works known as the Clydac Iron Works, and certain lands and mines with various powers and liberties for the purposes of carrying on the works and getting the minerals, "and also full and free liberty, license, power and authority (so far as the said Henry, Duke of Beaufort, has right to grant the same) to make and use such roads and ways in, over and upon the said lands hereby demised, and in, over, and upon, any of the said waste lands or grounds hereinbefore particularly described (and whereof the coal and iron mines are hereby demised), or any of the said other waste lands or grounds of the said Henry, Duke of Beaufort, in the parish of Llanelly aforesaid, as shall be found necessary or expedient for carrying and conveying the coals and iron ore so to be raised and landed as aforesaid, and for the commodious carrying on of the said business of an iron master at and upon the said furnace, iron works and lands hereby demised; and also to do all such other acts,

¹ See note 37 Am. Dec. 518. Whether fixture or no fixture is a mixed question of law and fact: *Grand Lodge v. Knox*, 27 Mo. 315.

matters, and things whatsoever in and upon the said lands hereby demised, and in and upon the said waste lands or grounds hereinbefore particularly described (and whereof the coal and iron mines are hereby demised), or any part thereof, as shall or may be deemed necessary or expedient in or about, or for the discovering, pursuing, scouring and working of the said mines, veins and seams of coal and iron ore hereby demised, and raising and leading the coals and iron ore therefrom, and for conveying such iron ore to the furnace or furnaces and other works on the said lands hereby demised and there smelting the same, and for carrying on the said business of an iron master at and upon the said furnace, iron works, and lands hereby demised in the usual and accustomed manner." The lease contained a covenant on the part of the lessees, that they would "from time to time, and at all times hereafter during the said term hereby granted, at their or some of their own proper costs and charges, well and sufficiently repair, amend, sustain, uphold, and keep in good repair, order, and condition all and singular the furnaces and other works, houses, and other buildings now standing or being, and which at any time hereafter during the said term hereby granted shall or may be erected and built upon the said land or grounds hereby demised, or any part thereof, and also all and singular the gates, rails, stiles, bridges, ditches, fences, water courses, flood gates, and dam-heads of or belonging to the said hereby demised hereditaments and premises, and also all and every other part of the said hereby demised hereditaments and premises, in all respects, matters, and things whatsoever; provided always, nevertheless, that the covenants herein contained respecting the repairs of the said premises shall not extend or be deemed or construed to extend in any manner to restrain the said Edward Kendall and Jonathan Kendall, their executors, administrators or assigns, from pulling down all or any of the works and buildings hereby demised, or of the works and buildings which shall or may hereafter be erected and built on the said land or ground hereby demised, or any part thereof respectively, for the purpose of rebuilding or altering the same, or of building others in their stead, so that the same shall be accordingly rebuilt or altered or others built in their stead, but merely to provide

and secure to the said Henry, Duke of Beaufort, his heirs and assigns, the means of preventing such works and building from becoming ruinous and going to decay." The lease also contained a covenant by the lessees that they, their executors, administrators or assigns, would at the end or other sooner determination of the term "peaceably and quietly surrender and yield up to the said Henry, Duke of Beaufort, his heirs and assigns, all and singular the coal and iron works and mines, veins and seams of coal and iron ore, which shall be then working, or shall have been worked at any time within three years next preceding, in or under the lands hereby demised, and the said waste lands or grounds hereinbefore described, and also all pits and shafts which shall be then open, and also all adits, levels, gutters, draining and water courses, and all ways and road in, upon, or under the same lands or grounds respectively, or any part thereof, in such good repair, order, state and condition as that the said coal and iron works may be continued and carried on by said Henry, Duke of Beaufort, his heirs or assigns, and also will, at the expiration or other sooner determination of the said term, leave and yield up unto and for the said Henry, Duke of Beaufort, his heirs or assigns, all and singular the furnaces and other works, messnages, cottages, and other erections and buildings which shall, at any time during the last ten years of the said term hereby demised, be standing or in being upon the said lands or grounds hereby demised, or any part thereof, and also all the gates, rails, stiles, hedges, ditches and fences upon or belonging thereto, in the like good order, repair and condition."

The defendant was a judgment creditor of John Powell, an under-lessee of the demised property, and had taken out execution. The bill was filed to prevent him from removing and disposing of certain tram-plates fixed upon iron and wooden sleepers, and the sleepers themselves which the sheriff had seized: These tram-plates and sleepers had been laid down by the Kendalls after the granting of the lease, and had been bought and paid for by Powell when he took his under-lease.

The court considered it clear upon the evidence that they were merely laid upon the roads formed on the ground, and were not affixed to the freehold, and that there was no custom

of the country entitling the landlord to claim them as part of the freehold. The question remained whether the terms of the lease were such as to bind the tenant to leave them.

The Vice-Chancellor considered that the stipulations of the lease bound the tenant to keep them in repair and leave them for the benefit of the landlord, and that the under-lessee, who had notice of the covenants in the lease, and his judgment creditor, were in no better position, and he accordingly granted an injunction.

The defendant appealed.

Sir H. M. CAIRNS and Mr. MACNAGHTEN, for the appellant.—On the fair construction of this lease there is no contract that tram-plates, not affixed to the freehold, shall not be removed. There is no covenant, in terms, not to take them away.

They are not part of the demised premises, since they were not on the property when the lease was granted and have not been affixed to the freehold, but are mere chattels: Chitty on Contracts, page 318; they, therefore, are not included in the covenant to deliver up the demised premises. There is no covenant which can embrace them unless they are included in the words “roads and ways” in the covenant to deliver up possession. But “roads and ways” do not in their natural sense include tramways, which are mere movable chattels placed upon a road for the purpose of more conveniently using it, and they ought to be construed in their natural sense according to common usage: *Mullan v. May*, 13 M. & W. 511.

By the custom of the country, which is admissible on this question, roads and ways are not understood to include the trams and rails which make them into railroads and tramways. The plaintiff's construction of the lease leads to this monstrous conclusion, that the lessces would be bound to keep and repair throughout the whole term a tramway, which might have become useless soon after its commencement, by reason of the mines to which it led having been worked out.

Mr. MALINS and Mr. CRACKNALL, for the plaintiffs.—The lease gives a right to make roads and ways, which must include a right to make railroads and tramways, when it was expedient to do so, and the covenant to leave all roads and

ways in good repair must have the same extent. No such hardship as the defendant suggests could result, for the proviso in the covenant to repair allows the tenant to remove any erections or fixtures from one part of the demised property to another. Moreover, the tram-roads are included in the word "works" contained in the covenant to repair. *Lord Mansfield v. Blackburne*, 6 Bing., N. C., 427; *Sunderland v. Newton*, 3 Sim. 450; *Naylor v. Collinge*, 1 Taunt. 19, are in our favor.

A lessee who covenants to leave all erections and buildings must leave them, though such as in the absence of such a covenant he would be entitled to remove as having been set up for trade purposes: *Martyr v. Bradley*, 9 Bing. 24. The intention of the lease was that the works should be given up at the end of the term as a going concern, an object which is defeated if the tramways are made useless.

Sir H. M. CAIRNS, in reply.—The lease contains no demise of roads and ways, and it takes a distinction between "works" and "roads." The covenant to repair extends only to the demised premises. If it had been intended to include in the covenants of this lease anything so utterly unattached to the freehold as tram-plates laid on the surface of a road, plainer words would have been used. The covenant to yield up applies only to things of a freehold nature, and it would be doing violence to its language to treat it as including chattels like these.

The Lord Justice Knight BRUCE.—This case is one of an interlocutory injunction granted in these circumstances. By virtue of an execution against a defendant under a judgment at law, the defendant having been an under-lessee of iron ores, coal works and mineral property, the sheriff seized, among other goods, certain tram-plates and wooden sleepers on which the tram-plates lie or are fixed. The defendant, I have said, was an under-lessee of the property where these things were. The bill has been filed and the injunction obtained by the head landlord, on the ground that if these tram-plates and sleepers are not fixed to the freehold and part of the freehold in the ordinary sense, they are still protected in his favor by the terms of the lease which he granted to the original lessees. The landlord's bill prayed an injunction accordingly in these

terms, beyond which, as I understand, the injunction granted does not go.

"That the defendant, his servants, agents, and workmen, may be restrained by the order and injunction of this honorable court from taking up, selling or removing the iron railroads and tramways now being in, upon, under, or about the said hereditaments demised by the said firstly hereinbefore-stated indenture of lease, or the coal or iron or other works authorized thereby or carried on, under, or by virtue thereof, or any part of the said iron railroads or tramways."

It probably would be too narrow a construction of the injunction thus prayed to say that it does not extend to the wooden sleepers. I understand it as extending to them. The evidence before us satisfies me that, independently of any covenant in the particular case, the general law of the country has not given the landlord any such right. The evidence convinces me that the sleepers and tram-plates in question are not fixed to the freehold, but are, to all intents and purposes, subject to any question that the terms of the lease may raise, the goods and chattels of the tenant (the defendant at law), and therefore liable to be seized by the sheriff under the execution against him. If, therefore, the case of the head landlord is to be considered as being put on any such right, I think that it wholly fails. As for the stone sleepers and the tram-plates lying on them, they may be placed out of the case, for, as I understand it, the defendant here, the plaintiff at law, is willing to undertake that he will not, and that the sheriff under his execution shall not, interfere with any of the stone sleepers, or with the tram-plates lying on them.

The question, then, is reduced to the terms of the lease, and though, for the purpose of construing the particular covenant on which directly the controversy turns, the whole lease must be read, yet, as I have said, the right claimed is put directly and merely upon this covenant. [His lordship read the covenant for delivering up the property on the determination of the lease.]

Whether for the purpose of interpreting this covenant we look to the rest of the instrument or not, I am of opinion that, according to its true meaning, it does not extend to chattels of this description.

Neither under the word "works," nor under the word "ways," nor under the word "roads," nor under all three together, are, in my opinion, movable chattels of this kind comprised, nor were they, as I consider this instrument, intended to be so comprised. It may be the duty of the tenant, at the end of the term, to leave the roadway in good order and condition, but the question is, whether it is his duty, according to this lease, leaving the road in good order and condition, to leave upon it the sleepers and tram-plates, movable as they are, without which I agree it can not be conveniently used, or can not be at all used as a tram-road or railway. That, in my opinion, is not the meaning of the covenant. The parties did not, as I read the instrument, intend to interfere with the right of the tenant to remove, or do what he would with what were only movable chattels used by him for the more convenient use of the tram-road. That is my exposition of the covenant which we are here asked to construe, and, I think, therefore, and my learned brother agrees with me, that we ought to act upon that interpretation. This, however, will not affect any right of action which, at the end of the term or otherwise, the landlord or his representative may have against the original lessees or their representatives, or against any other person. That right of action will remain; but to give a title to maintain the present injunction it is necessary, as I apprehend, that we should read the covenant in the manner in which the plaintiff asks us to read it. The construction which the plaintiff seeks to put upon it appears to me to contradict in spirit, if not in letter, the meaning of the whole instrument; and I consider, therefore, that the injunction ought not to stand. With regard to the costs of the motion before the Vice-Chancellor and the motion here, my impression is that they ought to be costs in the cause.

The Lord Justice TURNER.

I take precisely the same view of this case. So far as respects the stone sleepers and the trams resting upon them, I think that there was no case for granting an injunction, because the defendant had, as I understand the case, before the hearing of the motion, disclaimed any right to interfere with

them. So far as respects the iron sleepers or the wooden sleepers, and the trams resting upon those sleepers, I am of opinion that there was no case for this injunction upon the grounds which I am about to state.

I think it material, in the first place, to consider whether these tram-plates and sleepers were or were not affixed to the freehold. If they were not affixed to the freehold they were trade personal chattels of the lessee, belonging to him, brought by him upon the trade premises, continuing to belong to him, and, according to the general law, removable by him during the term: *Kerr, Inj.*, 252-255; *Chitty, Contr.* (9th Eng. ed.), 330, *et seq.* (10th Am. ed.) 373, *et seq.* and notes.

If they were trade personal chattels it lies upon the landlord to prove a custom preventing the tenant from removing them, or to show that the terms of the lease prohibit such removal. There certainly is no evidence of any such custom (if such custom there could be), and the lease ought not to receive a strained construction for the purpose of including within its terms trade personal chattels so as to prevent the tenant from removing them, as in the ordinary course of law he would be entitled to do. A lease ought not, I think, to be construed so as to take away the ordinary legal right of a tenant to remove trade chattels, unless such an intention is clearly expressed.

On both views of the case, therefore, it appears to me material to consider the question, whether these sleepers and trams were or were not affixed to the freehold; and I think it is perfectly clear upon the evidence that they were not so affixed. The evidence upon the subject seems to me to be all one way, for, though we have two witnesses on the part of the plaintiff who speak of them as affixed to the freehold, it is perfectly plain, when their evidence is examined, that what they mean by affixed to the freehold is merely that they are sunk in the soil by the pressure of the wagons passing over them.

The plaintiff's case, therefore, must rest, as indeed it was mainly put in the argument, upon the construction of the covenants in the lease, and on this point the case is put thus: it is said there is first a liberty granted by the lessor to the tenant to make roads or ways; then there is a covenant by the tenant with the lessor to repair, sustain and uphold the roads

and ways which are so made by the tenant; then there is a proviso at the end of that covenant, which would enable the tenant from time to time to remove from one part of the premises to another part of the premises the trams which may be laid down for the purpose of making these roads or ways, but no provision enabling him to remove the tram-plates off the premises, and, lastly, it is said, that there is a covenant that the lessee will, at the expiration of the lease, deliver up these roads and ways, so that the lessor may be enabled to continue and carry on the works. From these premises this conclusion is deduced, that the railroads or tramways made and used by the tenants were to be kept up by them, subject of course to the power of removal which I have mentioned, but with no further power of removal, and were to be delivered up to the plaintiff at the expiration of the term, the plaintiff, it is said, being entitled to come into the possession of these works as a going concern. The argument was attempted to be strengthened by a fact, which is alleged by the plaintiff in his bill, and which for the purpose of the argument, I assume to be correctly alleged, that there were railroads or tramways upon the premises at the date of the lease. Now, I think, upon considering these arguments, that the conclusion which is contended for by the plaintiff is not warranted by the premises from which it is attempted to be deduced. We have not here to deal with the railroads or tramways which existed at the date of the lease. There is no question before us upon them, and the fact of their existence does not seem to me to help the plaintiff's contention, because I think it may well be contended, that those particular railroads or tramways, which were existing at the date of the lease, may have been included in and demised by the lease. The lease was of the lands including the iron works, together with the appurtenances to the lands, works, and premises; and the roads, which were in use at the date of the lease for the purpose of the works, might well be considered as being appurtenant to the works themselves, and, therefore, included in the demise. Those railroads and tramways, therefore, which were existing at the date of the lease, would stand upon a different footing from the railroads or tramways which were made by the tenant after the commencement of the lease, and whatever obligations might rest upon the tenant

with reference to the railroads and tramways which existed at the date of the lease, it does not follow that the same obligations were meant to be imposed upon him with reference to those made by himself during the continuance of the lease.

We must, therefore, I think, consider the several grounds upon which the plaintiff relies, without reference to the question of the existence or non-existence of railroads and tramways at the time when the lease was granted. And, first, we have a liberty given by the landlord to the tenant to make and use roads and ways. [His Lordship here read the grant of such liberty.] Now, the first question here is, what is the meaning of the words "roads and ways," as used in this grant of liberty to make and use them? It is true that every railroad and every tramway is a road or way; but it is certainly not true that every road or way is a railroad or a tramway; and, in the ordinary course of making a railroad or tramway, the road or way is in the first instance laid down, and then it is converted into a railroad or a tramway by the rails or the trams being laid down upon the road or way which has first been formed for the purpose of receiving them. Indeed, it is common in speaking of an unfinished railway to say that the road has been made, but that the rails have not been laid down. It is quite clear, therefore, as it seems to me, that "roads and ways" would not in all cases extend to railroads or tramways, and I apprehend, therefore, it must depend upon the nature and purposes of the instrument, taken in connection with such evidence as may be receivable upon the subject, whether upon its true construction, the words "roads and ways," as there used, were or were not intended to include and extend to railroads or tramways. The evidence on this point is clearly in favor of the defendant. But if we look at the case, even without reference to the evidence, how does it stand? This is a grant of liberty by a landlord to a tenant, and it is, therefore, *prima facie* to be presumed, as I think, that it relates to a liberty to do an act in which the landlord was interested, and by which his rights were affected. Now, it is clear that he was greatly interested in the making of the roads or ways, without which, no doubt, the tramways could not be made; but it is difficult to see of what importance it could be to the

landlord, so far as the purposes of this grant are concerned, whether the rails or trams were or were not afterward laid down at the road or way when made. But it is said that this being the grant of the lessor, is to be construed most strongly against him, and that therefore it ought to be taken to include of necessity the right to lay down these rails and trams, so as to prevent there being any doubt upon that right. And this probably would be so if the question had rested merely upon the words granting the liberty to make and use roads and ways; but this grant is followed up by words giving the tenant liberty to do all such other acts, matters and things whatsoever in and upon the demised lands, and in and upon the waste lands thereinbefore particularly described, or any part thereof, as should be deemed necessary or expedient for (among other purposes) "conveying the iron ore to the furnaces and other works on the lands." It seems to me that this part of the grant draws the distinction between the right to make the roads and ways, and the right to do acts upon those roads and ways which shall be convenient for the purposes of conveying the iron ore to the smelting house. I think, therefore, that "roads and ways," as used in this part of the deed, could hardly, upon a fair reading of the deed, be meant to include railroads and tramways. I think that, if it had been intended so to include them, such intention would have been much more clearly expressed upon the face of the instrument, and I think so the more from this fact, that, according to the statement on the part of the plaintiffs, there were actually existing railroads or tramways upon these premises at the time when the lease was granted.

Supposing, however, that railroads and tramways are included in the words "roads and ways" as used in the grant of this liberty, was it or not incumbent on the lessee to keep them in repair? The covenant as to repairs is as follows: [His Lordship read the covenant.] Now it is clear that the tram-plates and sleepers in question are not part of the demised premises, and, therefore, if they are included at all in the covenant to repair, it must be under the word "works." But that word must be construed in connection with the other words, with which it is immediately joined, "furnaces and other works, houses and other buildings."

Upon referring to the other parts of the lease it will be found that this description, in a great degree, runs through the whole of the instrument, and I think that the word "works" was not intended to refer to any such works as mere temporary works of the tenant not affixed to the freehold, and laid down by him only for the purpose of the more convenient transport of the iron ore from the mine to the smelting house, but that it was intended to refer to permanent and substantial works, similar in their nature to the furnaces, houses, and other buildings which are spoken of. This is the more clear from the use of the words "erected and built," words which could not be applied to a railroad or a tramway of this description. But if there were more doubt as to the fair construction of the words, it would be material to see the consequences of adopting the construction contended for by the plaintiff. This is a lease for a term of seventy-eight years from the year 1801, not expiring, therefore, until the year 1879. Now, suppose that within two or three years after the granting of the lease the tenant, having, for the purpose of working the minerals in one part of the large extent of country over which the grant of these mines extends, made a road and laid down tram-plates for the convenient transport of the minerals to be raised from part of the mine, had worked out the ore from that part of the mine; is it to be contended on the part of the landlord that the true meaning of this lease was, that those tram-plates were to remain on the ground useless to the lessee during the whole period of the continuance of the lease, in order to be given up to the landlord at its expiration, by which time they would have become utterly worthless and useless to him? But yet that is the necessary consequence, as it seems to me, of holding that this covenant to repair extended to roads and ways of this description, because the obligation is not merely to repair, but it is to sustain and uphold them; and the lessee, therefore, could not, according to the strict legal construction, as I apprehend, of the covenant, after having once laid down these tram-plates, if they are within the range of the covenant at all, afterward take them up again. The weight of that argument seemed to be felt very much on the part of the plaintiffs, for it was endeavored on their part to escape from the difficulty by say-

ing that the lease does not prevent the tenants from removing the tram-plates from one part of the mine to another part of the mine, but only prevents their removing them off the mine altogether. But where is that to be found in the lease? The plaintiffs in support of that part of their case, rely upon the proviso at the close of the covenant to repair. [H's Lordship read the proviso.] Now I think it perfectly clear that this proviso has not the slightest reference to roads or ways, or to anything which may be done by the tenant in laying down tram-plates for the purpose of constituting railroads or tramways. It is a proviso which clearly refers to works and buildings which are capable of being erected and built, and in lieu of which, if pulled down, other works and buildings are to be erected and built, and, therefore, if this proviso does not, as I think it clearly does not, extend to the removal of the tram-plates, the consequence which I have pointed out upon the earlier part of the covenant to repair, must necessarily result.

Then, in coming to the consideration of the last clause, on which the plaintiffs rely, we enter upon it subject to the following considerations, first, that, to say the least, it is exceedingly doubtful whether the words "roads or ways," as contained in the liberty granted, were at all intended to apply to railroads or tramways of this description laid down by the tenant.

But if they were, I take it to be clear that there was no obligation imposed upon the tenant to keep them in repair. We then have a covenant by the lessee to yield up to the lessor all and singular the coal and iron works, veins and seams of coal, and all pits and shafts which should be then opened, "and all adits, levels, gutters, drains, and water courses, and all ways and roads in, upon, or under the same lands or grounds respectively, or any part thereof, in such good repair, order, state and condition as that the said coal and iron works may be continued and carried on" by the lessor, his heirs or assigns. Now, if the tenant was not bound to maintain roads or ways of this description, which he had laid down, how can it be within the meaning of this covenant that he was bound to deliver them up at the expiration of the term? If, therefore, I am right in the construction of the covenant to repair,

it seems to me necessarily to follow that these roads and ways, movable as they are, would not be within the meaning of this covenant to deliver up. There is, it is to be observed, an express covenant, which follows upon this, to leave "the furnaces and other works, messuages, cottages, and other erections and buildings which should at any time during the last ten years of the said term thereby demised be standing or in being upon the said lands or grounds." It can not be said, therefore, that you must imply a covenant to yield up other matters than those which are the subject of express covenant. The whole argument on this part of the case, therefore, really resolves itself into the last few words of that covenant, that the premises are to be yielded up in such good order, state and condition, as that the coal and iron works may be continued and carried on by the duke. Now, does that mean of necessity that they are to be yielded up with the rails and tram-plates which may be laid down by the tenant, and which, according to the ordinary course of law, the tenant would be entitled to remove; or does it mean this, that the roads and ways themselves are to be yielded up, leaving it to the tenant to remove the tram-plates which he may have laid down? Was it meant that the duke was to be entitled to take as his own that property which, in the ordinary course of law, belonged to the tenant, or was it simply meant that he should have those roads and ways in which he was interested, and which had been made under the grant by which he had given liberty to make them, delivered up to him in good repair, so that he might be enabled to continue the works by placing the tramways upon them, which should enable the works to be conveniently carried on? I think it clear that the latter is the true meaning of this covenant, that it extends only to the delivery up of the roads and ways in good repair, without the plant which had been laid down upon them, and that the injunction ought to be dissolved. I agree as to the costs.

PRESCOTT ET AL. V. WELLS, FARGO & Co.

(3 Nevada 82. Supreme Court, 1867.)

Mingled averments of tort and contract. Where sufficient facts are stated to justify recovery, the confusion of matters of tort and contract in the statements of the complaint, will not prevent the pleading being sustained.

Fixtures defined. A fixture may be defined as anything by artificial means attached permanently or substantially to the soil or freehold. More technically it is something substantially affixed to the land but which may afterward be lawfully removed therefrom by the party affixing it, without the consent of the owner of the freehold.

Amalgamating machinery furnished to a mill owner upon his agreement to pay rent therefor and attached to the realty *considered* as within the latter definition of fixtures.

The allegation of the value of fixtures, in suit for their conversion, is not essential. It is sufficient to allege the amount in which plaintiffs were damaged.

Proof of value. The proof of the value of the fixtures is material in showing the amount of damages; and from the value the cost of removal would have to be deducted, and such cost could be shown on cross-examination.

Appeal from District Court, First District, Hon. RICHARD RISING, presiding.

The facts in the case and the main features of the pleadings on which the case turned are set forth in the opinion of the court.

C. E. DeLONG, for appellants.

SUNDERLAND, WOOD & HILLYER, for respondents.

BEATTY, C. J.

This case presents the following material facts: In the month of August, 1862, Burton, Kellogg and Uznay owned a quartz mill called the Phoenix Mill, and were conducting the business of crushing quartz, under the firm name of "Phoenix Mill Co." At this time their mill property was mortgaged for some \$20,000, and the defendants, Wells, Fargo & Co., held the mortgage as assignees of the original

¹ *Meigs' App.*, 62 Pa. St. 28; 1 Am. R. 372.

mortgagees. The Phoenix Mill Company being anxious to add some pans and other machinery to their mill, applied to the plaintiffs to rent them the necessary machinery. The plaintiffs consented to enter into the arrangement, provided Wells, Fargo & Co. would become parties thereto so far as to protect them against any loss or danger arising from their claim by way of mortgage.

The result of the negotiation was, that two articles of agreement were drawn up and signed. The first is dated August 14, 1862, and purports to be between H. J. Booth & Co., of the first part, and the Phoenix Mill Company, of the second part. By this agreement the parties of the first part grant, demise and let to the parties of the second part various articles of machinery, to be delivered at the Phoenix Mill at various specified days between then and the first of October following; the said machinery to be leased to the mill company for the period of six months, from the first of October ensuing, at a monthly rent. At the end of six months the parties of the second part agree to surrender the machinery. There is a further promise that the parties of the second part may, at their option, purchase the machinery after the expiration of six months, at a specified price. This instrument concludes with the usual form of sealed instruments, and is signed thus:

H. J. BOOTH & Co. [L. s.]

PHOENIX MILL Co. [L. s.]

By CHAS. UZNAY.

The second is dated August 15, 1862. It recites the facts in relation to the mortgage executed by the members of the Phoenix Mill Company, their agreement with Booth & Co. for the machinery, and the fact that Booth & Co. might, under that agreement, require the privilege of removing the machinery, and winds up as follows:

"Now, therefore, for the purpose of assuring to said Booth & Co., without objection or hindrance on the part of Wells, Fargo & Co., the right to make such removal if they shall require it, as well as in consideration of the sum of one dollar, cash in hand, paid by said Booth & Co. to Wells, Fargo & Co., they, the said Wells, Fargo & Co., hereby agree and consent that the said Booth & Co. may have the right and privilege of

removing said amalgamating machinery from said mills on the expiration of said six months' lease; provided, that the same shall be done without detriment or injury to the said mills or machinery as it now stands.

"Dated at Virginia City, Nevada Territory, August 15, 1862.

"H. J. BOOTH & Co. [SEAL.]

"WELLS, FARGO & Co. [SEAL.]

"By W. H. SIMMONS, Ag't."

Several months before the expiration of the lease, Wells, Fargo & Co. took steps to foreclose their mortgage. About two weeks after the expiration of the lease the decree of foreclosure was rendered, and in a little less than a month after the decree the sale took place, and Louis McLane—one of the firm of Wells, Fargo & Co.—became the purchaser. In this purchase, it is admitted he was acting for the company. At the end of six months, the sheriff's deed was executed to McLane. In the meantime the original owners of the mill remained in possession. After McLane got the deed the mill company attorned to him and they paid rent, but never delivered the actual possession. McLane entered into a contract to resell to the mill company; but they being unable to pay, this contract was not carried out, and at their request he sold the mill to a third party. Before this sale was made, Booth & Co. had made a written request of James H. Latham (the agent of Wells, Fargo & Co., at Virginia City, where the property is situated) to be allowed to enter on the premises and remove the leased machinery. To this request the agent made an evasive reply, neither authorizing nor refusing permission to enter on the premises and remove the rented machinery. Such appear to have been the facts proved on the trial.

It is necessary now to revert to the pleadings. The complaint is against a number of parties who are alleged to be partners, composing the firm of Wells, Fargo & Co. The complaint first recites the fact of the execution and transfer of the mortgage by the mill company. That they (plaintiffs) were at a certain time the owners of certain machinery. That they refused to rent it until Wells, Fargo & Co., "for a valuable consideration, undertook and faithfully promised and

agreed to and with said plaintiffs, that they, said plaintiffs, should have the right and privilege of removing said amalgamating machinery above described from the said mill at the expiration of the said proposed lease." That upon this agreement being entered into by Wells, Fargo & Co., they leased the machinery to the mill company, setting out the terms of that lease and making it a part of their complaint. That before any part of the machinery was delivered they had entered into the contract with Wells, Fargo & Co. for its removal, etc., stating the substance, effect and legal operation, as the pleader seems to have understood it, of that instrument, and setting out the instrument itself, and averring that Wells, Fargo & Co. received a valuable consideration for entering into it. That the machinery was delivered in accordance with the terms of the lease. That the mortgage was foreclosed, and defendants obtained possession of the property mortgaged, including the machinery. The concluding part of the complaint is as follows:

"The plaintiffs further allege upon information and belief, that all of said bottoms, pans, shafting, gearing, etc., are still in said mill; that the said lease has expired, and aver that they, the said plaintiffs, are still the owners of and lawfully entitled to the possession of the said property, and that the same has never been paid for by the said Phoenix Mill Company or by the said defendants. The plaintiffs further allege that being so the owners, and entitled to the possession of the said property, they did, on or about the fourteenth day of February, 1865, at Virginia, county of Storey, make demands upon the said Wells, Fargo & Co. to surrender to them all of the said property, or to permit the said plaintiffs to enter upon the said premises, and permit them to remove the said property, the said plaintiffs offering to effect said removal without detriment or injury to the said mills or other machinery not belonging to them. The plaintiffs finally allege that the said defendants wholly failed, neglected and refused, and still do fail, neglect and refuse, either to deliver the said property, or any part thereof, to the said plaintiffs, or to permit them to enter upon the said premises and effect said removal themselves. But the said defendants have kept, retained, and converted the said property to their own use and

benefit, whereby the plaintiffs have sustained damages in the sum of \$10,000. Wherefore the plaintiffs bring suit and demand judgment against the said defendants for the said sum of \$10,000 and costs of suit."

The answer denies that there was any consideration for the contract entered into by Wells, Fargo & Co.; denies some of the legal effects alleged by the plaintiffs to arise upon the execution of the contract; denies that Wells, Fargo & Co. ever got possession of the mortgaged property or had control of the machinery, and closes with the following denial: "And defendants further deny that they have kept, retained, or converted the said property, or any part thereof, to their own use or benefit; or that by any act of defendants, plaintiffs have sustained damages in the sum of \$10,000, or any other sum whatever."

Upon these pleadings the parties went to trial, and plaintiffs offered to prove, by one Tyrel, the value of the machinery in the month of February, 1865, the time that the plaintiffs demanded permission to remove it. This the court refused, on the ground that there was no allegation in the complaint of its value at that time. The plaintiffs then offered to prove by the same witness the amount of damages they had sustained by failure and neglect of defendants to surrender the property. The court refused also to admit this evidence, and then granted a nonsuit on the ground that plaintiffs had failed to prove a conversion by defendants.

To each of these rulings plaintiffs excepted, and now allege that they were erroneous, and the judgment should be reversed.

The first question to be determined is: What is the nature of this action? The respondents contend that it is trover, and that there was no proof of conversion, and therefore the action can not be maintained, and the nonsuit was right. The complaint seems to have been framed as an action on contract. Whether in assumpsit or covenant it would be hard to say. And from the peculiarities of the instrument (signed with the firm or partnership name of the contracting parties, and having a seal annexed to and following their signatures) it is perhaps equally hard to say whether the contract should be treated as a covenant or a mere written

agreement not under seal. But treating it as one or the other, the facts are all set up in the complaint, which it would be necessary to set up either in an action of covenant or assumpsit. As our statute does away with all mere form, it is allowable to treat it as one or the other. In addition to all the allegations necessary to sustain the complaint as one on contract, there are also other allegations sufficient to make it a good complaint in trover. If we treat this as an action of trover, at least nine tenths of the complaint are surplusage. The allegations necessary to maintain that action are simple and few. All the allegations about the contracts, etc., would in such case be surplusage. It is true that the facts stated in the complaint would have to be proved; but if the action is to be treated as one in tort, they ought not to be stated in the pleadings.

On the other hand, if we treat this as an action on contract, then all that part about conversion, etc., which pertains particularly to the action of trover, is to be treated as surplusage. But whatever the action may be, it is for a single object: to obtain damages done to plaintiffs by depriving them of their machinery. Under our very liberal system, the pleading must be sustained, and the plaintiffs will be entitled to recover, if all the facts stated in the complaint, and which are sustained on the trial, either by proof, the admissions of defendant in open court, or the want of denial in the answer, show that plaintiff has a good cause of action to recover in damages. Let us see first whether the plaintiff is entitled to recover in trover. To determine this, it is necessary to make some investigation as to the nature of what I shall, in this opinion, call *fixtures*. This word "fixture" is used in a variety of senses. In its broadest signification it is sometimes used to designate anything which is by artificial means attached permanently or substantially to the soil or freehold. But there is another and more technical meaning sometimes given to the word. That is, something substantially affixed to the land, but which may afterward be lawfully removed therefrom by the party affixing it, or his representative, without the consent of the owner of the freehold. It is in this latter sense that the word is used in this opinion. Fixtures of this kind have been held by many

courts in the United States as personal property, even while attached to the soil. As they are the personal property of the party attaching them to the soil before they become fixtures, and as he has the right to remove them at any time, and again convert them into personal property, some courts have seen proper to hold them all the time as such. Under this view of the case, courts in Maine, Massachusetts and New York have sustained actions of trover for fixtures that were never removed or detached from the freehold. See *Russell v. Richards*, 1 Fairfield, 429; *Ford v. Cobb*, 20 N. Y. 344; *Smith v. Benson*, 1 Hill, 176; *Wells v. Banister*, 4 Mass. 514; *Ashmun v. Williams*, 8 Pick. 402.

In all these cases the courts call the things which are the subject of litigation personal property, although they are, technically, fixtures; that is, things attached to the land, but with a privilege on the part of some one other than the owner of the land to remove them. If these cases be law, then we have no doubt of plaintiffs' right to recover in this action, for these pans, etc., clearly became fixtures under the contracts with the Phoenix Mill Company and Wells, Fargo & Co. The sale of the property and purchase thereof by McLane for Wells, Fargo & Co., did not change their status. There can be no doubt but that as long as either the one or the other of these parties held the mill, the plaintiffs had a right to take off the pans. McLane, acting for Wells, Fargo & Co., converted the pans by selling them with the mill. No other proof of conversion but the sale of the mill with its fixtures was necessary. Under these authorities, Booth & Co. could either treat the sale by McLane as a conversion and sue Wells, Fargo & Co., or might demand the pans, etc., from the present owners of the mill, and on their refusal to surrender, sue them.

But while these authorities, highly respectable in character, support this view of the case, the writer of this opinion can not but dissent from the views expressed in all these cases. In my opinion, property is either real or personal, according to its nature. Contract can not make a chattel realty, nor realty a chattel. The case cited from 1 Fairfield, shows the danger of such departures from common law principles. In that case, a man buys a piece of land with a saw mill on it. He knows

nothing about anybody but the owner of the freehold having any claim to the mill. But after the purchase, he is sued for the mill, and its value recovered from him. If such a doctrine is tenable, then the man who buys a lot covered by a brick house may, without any negligence on his part, be compelled, after having paid the owner of the soil for lot and house, to pay somebody else for the house. Such a doctrine appears to be extremely dangerous. The New York courts seem to hesitate in following the Maine case to its legitimate result. They seem only willing to apply the principles of this case when the property in controversy approaches the character of personalty in its nature. But if mere contract can convert potash kettles built into a wall in such a manner as to be firmly attached to the freehold, then it can also convert saw mills and granite walls into personalty. In my opinion, all fixtures, while attached to the freehold, are, for the time being, a part of the realty. No contract can change their nature. It is true there may be a contract allowing some one to take them off. Indeed, unless there be some contract, law or custom allowing such removal, they are not technically fixtures. But a contract that something may be converted into personalty at a future day, does not make it so from the time of the contract. The owner of the land might make a contract allowing another to take off all the soil to the depth of ten feet for making brick; but the contract alone would not convert the surface of the soil into bricks or other personal property. It would still be a part of the freehold. In my opinion, this complaint should be treated, not as a declaration in tort, but as one on contract. As such I believe it to be sufficient.

The necessary preliminary facts appear by the pleadings; the instrument which is the foundation of the action is set out, and we think a breach is well assigned. Among other things, defendants agreed that plaintiff might "have the right and privilege of removing said amalgamating machinery from said mills," etc.

The breach assigned is, that defendants wholly failed, neglected and refused, and still do neglect and refuse to deliver said property (amalgamating machinery) * * * or to permit them (plaintiffs) to enter upon the said premises (the

premises where the machinery is fixed), and effect said removal themselves. The breach is not in the same language of the contract, yet it seems to be sufficiently stated. The answer does not negative this breach. There are indeed but few material allegations or denials in the answer. It denies any consideration for the agreement, but ample consideration is proved. It denies any damage, and denies that defendants were ever in actual possession of the mill and machinery. These are all the material denials therein contained. The denials of any damages arising from the action of defendants, put the plaintiffs on the proof of these damages, and we think one of the best methods of proving these damages was to prove what the machinery was worth when plaintiff asked permission to remove it. Of course the value would have been diminished by the cost of removal, but that cost would have been a proper subject of cross-examination. There is nothing in the point that plaintiff did not aver the value of the machinery at the time he offered to remove it. Such an averment would have been unnecessary, treating this action as in tort, or on contract. The proper averment was the amount of damage sustained by the tort or breach of contract; proving the value of the property was only one of the many methods of proving the damage. We are not by any means satisfied that the fact that defendants never were in the actual possession of the mill is a sufficient excuse for refusing to permit plaintiffs to enter and remove the machinery. *Non constat*, but that if defendants had consented, their tenants, who were the original lessors of plaintiffs, would also have consented to the removal of the machinery. As the pleadings stand, it appears to us the plaintiffs should have been allowed to prove their damages.

The cause is reversed, and remanded for a new trial.

LEWIS, J., concurring: I concur in the judgment.

BROSAN, J., did not participate in this decision.

HEFFNER V. LEWIS ET AL.

(73 Pennsylvania State, 302. Supreme Court, 1873.)

Sale of tramway by creditor of lessee. Plaintiff and defendants leased adjoining coal lands to the same lessees; a tunnel was made through plaintiff's land to reach defendants', on which was the outlet of the slope; rails were laid by lessees on the track in the tunnel. Their leasehold interest in the defendants' land was levied on, with the appurtenances, consisting of a breaker, etc., "and railroads in and about and connected with said mines." The rails had been removed from the track, and plaintiff claimed that they had been delivered to him for rent. In an action of trover for them, *held*, that whether the rails were included in the levy was properly submitted to the jury.

¹ **Machinery during term of lease.** Machinery erected by a lessee to carry on his business is personal property during his term; it may be sold on execution, and the purchaser may remove it before the expiration of the term.

March 4, 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of Schuylkill County. No. 51, to July Term, 1871.

This was an action of trover brought August 1, 1865, by Samuel Heffner against Lawrence F. Lewis, Jr. (who was served), and others not served, for 890 yards of iron rails.

On the 10th of February, 1854, Lawrence Lewis and Robert M. Lewis, leased to William Brittain and Charles Brittain, for the term of fifteen years, the right to mine, dig and carry away coal from the land of the lessors, near Minersville, in Schuylkill county, "from a series of veins of coal which have been proven and cut by a tunnel driven by George Sponsler to the Peach Mountain vein on said tract," etc.

On the 15th of November, 1854, the Brittains, to secure the payment of \$2,000, with interest on the first days of June and July then next, mortgaged to their lessors the above mentioned mining right, "together with the engines and breaker-machinery, slope fixtures and buildings and improvements, mining implements, etc., on, at, or erected at, and appertaining to said coal lease, colliery, etc., on said tract of land as

¹ *Hayes v. New York Co.*, 2 Colo. 273.

used and now in the possession of the said William and Charles Brittain on said premises, as far as their right to or interest in the same under said lease extends."

The defendants are the successors of the above named Lewises.

On the 24th of May, 1856, the plaintiff leased to the Britains, "the right and privilege to mine and raise coal as the right and property" of the Britains "on the tract of land * * * adjoining lands late of R. M. and S. Lewis, and known as the Dreibelbies tract," for thirteen years from February 10, 1856, "said mining of coal to be restricted to the veins of coal, one known as the Peach Mountain vein, and the other the vein next north of the Peach Mountain vein." It was further agreed by the lease, that the Britains might "have the right to drive the tunnel they are now driving upon the Lewis tract of land in and through the said Dreibelbies tract, from where the said tunnel now strikes the last mentioned tract to the Peach Mountain vein, and also that the said (Britains) may draw, carry and take through or over the said tunnel, so far as the same may be driven on the said Dreibelbies tract, all the coal they may mine on the Lewis tract * * * without any charge for the same"; the Britains to pay twenty-five cents per ton for coal mined from the plaintiff's veins; the plaintiff to have the same remedy for collecting the coal rent as in other cases under the landlord and tenant acts.

The cause was tried April 24, 1871, before RYON, P. J.

The plaintiff, Heffner, testified that the Britains sank a slope on the Lewis tract and tunneled to plaintiff's land; the Britains leased to one De Haven, who put all the iron in dispute on the gangway, which was not opened till De Haven went in; the Britains paid plaintiffs no rent; De Haven paid him some rent and gave him the railroad iron which De Haven had laid on plaintiff's land. Morgan and Weist afterward leased from plaintiff, and at that time he owned the iron on the land; it was taken up before the lease expired because it was necessary to sink a slope, and the tenants could not agree with the Lewises, and abandoned the workings; Weist showed plaintiff the iron at the head of the slope, and

told him to haul it away; he sent for it but did not get it; it was taken out and sold; there were 1,337 feet of the gangway laid with iron on plaintiff's land.

T. Morgan testified that the iron was on the land leased from Heffner; Morgan and Weist had taken out under this lease all the coal on the Heffner tract; witness took the iron to the top of the slope on Lewis' land and showed Heffner the iron which witness understood belonged to him; he said if they sank again he would leave it for their use.

R. Winlack testified that he purchased from the Lewises all the machinery and iron at the colliery, including that in dispute.

The defendants gave in evidence a *fi. fa.*, *Mourer & Witzel v. W. & C. Brittain*, to September term, 1858, and alias *fi. fa.*, *Same v. Same*, to December term, 1858; the levy was as follows:

"Levied on all the right, title, interest of William Brittain and Chas. Brittain, of, in and to a certain coal lease having about eleven years to run, on lands of R. M. & L. Lewis, situate in the borough of Minersville, and partly in Branch township, Schuylkill county, and known as the Lewis colliery, with the appurtenances, consisting of a frame coal-breaker with a double set of schutes and screens, etc., a forty-horse breaker engine, a sixty-horse power hoisting and pumping engine, a thirty-horse power engine, frame slope-house, frame stable, frame office, frame oil-house, frame powder-house, frame blacksmith shop, railroads in, about and connected with said mines, twenty drift cars, and all other machinery belonging to said breaker, as the property of William Brittain and Charles Brittain."

The writ was indorsed: "1859, January 22d. Property within mentioned sold on this writ and writ of *levari facias*, No. 168, March T. 1859, to George S. Repplier, for three thousand dollars, and proceeds of sale applied as follows, to wit: on account of rent claim of Lawrence Lewis *et al.*, \$2,943.46; to costs on this *fi. fa.*, \$35.95, and to costs on *levari facias* No. 168, March T. 1859, \$20.59, and *nulla bona* as to debt within mentioned."

Also *levari facias* at the suit of the Lewises against the

Brittains, on the coal lease mortgage of November 15, 1854, to sell the property as described in the lease.

The sheriff returned: "1859, January 22d. Property within described sold on this writ, and writ of alias *fi. fa.*, No. 285, Dec. T. 1858, to George S. Repplier, for three thousand dollars, and proceeds of sale applied as follows: on account of rent claim of Lawrence Lewis *et al.*, \$2,943.46; to costs on this writ, and on *fi. fa.*, No. 285, Dec. T. 1858, \$35.95."

Also *fi. fa.*, No. 106, to October T. 1860, *Pott et al. v. George S. Repplier*, and No. 107, to same term, *Charles A. Repplier v. Same*, under which the sheriff levied "on all the right, title and interest of Geo. S. Repplier, of, in and to a certain coal lease having about nine years to run, on land of R. M. & L. Lewis, situate partly in the borough of Minersville, and partly in Branch township, Schuylkill county, and known as the 'Lewis colliery,' with the appurtenances, consisting of a frame coal-breaker, with a double set of schutes, screens, rollers and elevators, a forty-horse power steam engine for breaking coal, with boilers and gearing, a sixty-horse power hoisting and pumping engine, with boilers and gearing, pumps, pump-rods, slope-chain, frame slope-house, frame stable, frame office, frame oil-house, frame powder-house, frame blacksmith shop and carpenter shop, frame slope-house, with twenty-five horse power steam engine, drum, with wire rope, railroads in, about and connected with said mines"; and on the 26th of October, 1860, sold the property to the Lewises for \$4,750.

Also lease dated Oct. 29, 1860, from the Lewises to Charles A. Repplier, for the "Lewis colliery," and assignment of this lease January 17, 1862, to Weist & Morgan.

J. Weist, one of the assignees, testified that they went into possession of the colliery under the assignment, and took possession of the railroad tracks in the veins to mine the coal; the tracks were necessary for the working the Peach Mountain vein; there was no way of working it at this point but through Lewis' land; they got the lease from Heffner after they went into the colliery under the assignment, about May, 1862; they had had no understanding with Heffner until after the assignment from Repplier.

The defendants gave evidence that the Brittains owed De

Haven about \$10,000, on August 1, 1856; Brittain and De Haven entered into a contract by which De Haven was to have the Lewis colliery and another colliery until the profits paid the debt, when Brittain were to have the collieries, etc., back; there was no transfer on the leases; the personal property was at the date of the contract transferred to De Haven; he never got his money out; the colliery was sold as Brittain's; De Haven worked under Heffner and took coal from his land.

James H. Campbell, Esq., testified that he had been agent for the Lewises from 1844 to 1866, and had charge of the Lewis colliery; Weist & Morgan threw up the lease about December, 1863, and witness made arrangements with Morgan & Harris to take out the iron. Heffner claimed the iron as owner of the land on which it was; witness never heard him claim as purchaser from De Haven.

W. Brittain testified that the Brittain did not sell the colliery lease to De Haven, but gave it to him to work out their debt; the leases were sold out, and De Haven had nothing more to do with it.

The defendants gave evidence that on the 29th of August, 1868, De Haven made an assignment for the benefit of his creditors to L. C. Dougherty.

The plaintiff in rebuttal offered in evidence the record from the docket of a justice of the peace of a proceeding by Heffner against the Brittain and De Haven to dispossess them for the non-payment of rent; he gave evidence also for the purpose of supplying part of the record which was not produced. The court rejected the offer on the ground that the evidence of the lost record was not sufficient, and sealed a bill of exceptions.

He gave evidence that Dougherty, the assignee, etc., of De Haven, had worked the Lewis colliery until it was sold by the sheriff, when he at once gave up the possession; Heffner claimed rent while Dougherty was in possession; De Haven owed Heffner \$1,400 or \$1,500 for rent. Heffner further testified that De Haven gave him the iron before December, 1857, and afterward owed him between \$1,200 and \$1,500. De Haven said he would give Heffner this iron on account of rent; no price was fixed for the iron.

The plaintiff's points, with their answers, were:

1. "The levy and sale by the sheriff of the leasehold property of the Britains did not include the lease of Heffner to the Britains, and consequently passed no title to any improvements on the land of Heffner, but must be confined to the leasehold interest, fixtures and improvements of the Britains on the land of the defendants."

Answer: "The lease by Heffner to Britains was not sold by the sheriff, but the levy being upon all the railroads in and about the colliery, was in terms sufficiently comprehensive to include the railroad in the Peach Mountain, for that vein was worked in connection with the colliery, and was a part of the same colliery, and the railroads were all connected, forming one line of road from the bottom of the slope to the various points from which coal was dug. We do not, however, instruct you that the sheriff's sale did or did not convey any title to any improvements on the land of Heffner; you must determine that from the evidence and the instruction in our general charge. We therefore decline to give this instruction, but refer the facts to the jury."

2. "The levy and sale by the sheriff of the leasehold interest, fixtures and improvements of George S. Repplier, passed no title to the purchaser of any of the improvements on the land of Heffner, nor were the same included in any of the subsequent transfers or assignments of the leasehold interest in the colliery leased and owned by defendants."

Answer: "The sheriff's levy and return of sale was comprehensive enough to embrace all the railroads which were connected with this colliery and belonging to George S. Repplier. We decline, however, to say what did or what did not belong to Repplier, and what particular property passed by the sheriff's sale and the subsequent transfers—that is a question of fact for the jury. For the reasons given above and in our general charge we decline to affirm this point."

3. "The defendants have failed under the evidence, documentary and parol, to show any outstanding paramount title to the railroad iron in dispute, either in the defendants or any other persons."

Answer: "This instruction we decline to give, as it is a question of fact for the jury."

The court charged:

"This action was brought by the plaintiff to recover damages from the defendants for taking and carrying and converting to their use a quantity of railroad iron. The plaintiff claims to have purchased the iron in question in the spring or summer of 1857 from William De Haven, who was then working the Lewis colliery, and who claimed the iron. You will recollect the plaintiff's testimony upon this subject and any other testimony bearing upon this question. The plaintiff also swears that he was in the possession of this iron by himself and his tenants, and if you should find the fact of purchase by the plaintiff as claimed by him and that he remained in possession, we then instruct you that the plaintiff would be entitled to recover.

"The defendants claim title to this iron also by purchase, and allege the following facts as evidence of title:

"The defendants leased the land upon which the Lewis colliery was originally erected to the Britains, in 1854, for fifteen years. Britains sunk a slope and put up the breaker improvements, but found that they could not work the Peach Mountain vein without working some of it on the plaintiff's land, and they obtained a lease from the plaintiff, in 1856, to run for the term of fifteen years.

"The lessees, Britains, became involved and sold the lease and personal property belonging to this colliery to William De Haven, and also the right to use the fixtures, railroads, etc., until he got out of the colliery what Britains were owing him, and then the whole was to revert to Britains.

"De Haven went into possession of the colliery and mines, but becoming involved, he made a general assignment for the benefit of creditors to L. C. Dougherty and Mr. Garner. The assignees worked this colliery until January 22, 1859, when it was sold by the sheriff to George S. Repplier.

"Now what property was sold must be determined from its levy under the circumstances of this case. The levy is upon all the right and title of the Britains in the coal lease of R. M. & L. Lewis, known as the Lewis colliery, with the appurtenances, buildings, breaker, machinery, etc., *railroads in and about the mines and connected with said mines*. The question is, whether the levy on the railroads was a levy upon the railroad on Heffner's lands. The Britains, as we have

said, had a lease from R. M. & L. Lewis, for the land upon which the slope was erected. They subsequently to the date of that lease, in 1856, obtained a lease from Heffner to work the Peach Mountain vein, and drove a tunnel from the slope across to that vein, at the point where the tunnel reached the Peach Mountain vein, and for a considerable distance east and west from that point; the coal in the vein was partly upon the Heffner tract; by these two leases the workings in the two tracts constituted but one colliery. When the levy was made upon all the railroads in and about the mines and connected with said mine, it was a levy upon all the railroads at the colliery, and undoubtedly embraced the railroad upon the Heffner land, and if the roads belonged to Brittain in 1859 (January 22d), then the sheriff's sale conveyed the title to the iron upon the Heffner tract to Mr. Repplier.

"Again, Oct. 9, 1860, the sheriff levied a *fi. fa.* upon a judgment against Geo. S. Repplier, upon the Lewis colliery, and the railroads in, about and connected with said mines. On 26th Oct., 1860, the sheriff sold this colliery as levied upon, and railroads, to the Lewises, the defendants. This levy and sale undoubtedly conveyed all Repplier's interest in all the railroads connected with the mine which embraced the road on Heffner's land. If Geo. S. Repplier had a title to the railroad iron on Heffner's land, then the sale to Lewises conveyed that title to Lewis.

"R. M. & L. Lewis made a lease of the Lewis colliery and its appurtenances to Charles A. Repplier, binding the lessee to keep all the gangways, railroads, etc., in repair.

"On the 17th Jan., 1862, the lessee, Chas. A. Repplier, assigned his interest in this lease to Weist & Morgans, who, with the consent of the Lewises, went into possession. You will observe that the lease to Charles A. Repplier by the Lewises did not sell the premises, but gave the right to the tenant to use the fixtures for the term of the lease. It gave to Repplier no right to remove any of the landlord's property, and the transfer to Weist & Morgans bound them to keep all the covenants in the lease to Repplier, and of course Weist & Morgans could not take up any of the railroads and let Heffner nor anybody else other than the landlords have it if the iron belonged to Lewises.

"But it is contended by the plaintiff that Weist & Morgans, in June, 1862, took a lease from Heffner, and agreed in that lease to take up the iron and deliver it, at the head of the slope, to Heffner; now, if Lewises took a title to the iron upon Heffner's land by virtue of the sheriff's sale as the property of Repplier to Lewises, Weist & Morgans could not enter into any arrangement with Heffner by which they could give, or Heffner could get, any right to the iron; such an arrangement would be without any effect as against the interest of Lewises.

"Some question has been raised about the right of Lewises to purchase and use the railroad on Heffner's land. You will bear in mind that, at the time the iron was removed, Heffner's lease to Brittains, under which the iron was laid upon the gangways, had not expired. A colliery is an improvement for manufacturing purposes, and a tenant may erect fixtures, like a railroad in a mine, and remove them again from the land during his term. When the fixtures are sold as the property of the tenants, and bid in by third parties, such third persons may remove the fixtures if the purchaser goes into possession of the fixtures, as is claimed by the defendants in this case, without removing it, but does remove it before he is lawfully ejected, and before the expiration of the lease, the purchaser's title is good if he acquired a title by the sale under which he claims." * * *

The verdict was for the defendants.

The plaintiff removed the record to the Supreme Court, and there assigned for error:

1-3. The answers to his points.

4. The rejection of his offer of evidence.

The remaining assignments were, in a number of specifications, to the charge of the court.

J. WRIGHT and B. W. CUMMINGS, for plaintiff in error.—What property passes by a sheriff's sale is to be determined by the levy: *Grubb v. Guilford*, 4 Watts, 223. The sheriff could not sell fixtures without consent of the owner of the land: *Mitchell v. Freedley*, 10 Barr, 198.

W. R. SMITH and J. W. RYAN, for defendants in error.—The levy containing ambiguity that might be removed by

parol evidence to be submitted to the jury: *Scott v. Sheakly*, 3 Watts, 50; *Dolan v. Briggs*, 4 Binney, 496; *Shcemaker v. Ballard*, 3 Harris, 92.

The opinion of the court was delivered, May 17, 1873, by MERCUR, J.

This action was brought to recover the value of a quantity of iron rails. They had been taken and converted by the defendants.

The plaintiff has filed fourteen assignments of error. The first three may be discussed together. The Brittains had leased, for mining purposes, adjoining lands of the plaintiff and of the defendants respectively. They worked veins upon the land of each. In order to mine some of the coal on defendants' land it was necessary to cross plaintiff's land, but making the outlet on defendants' land. They sunk a slope, erected a breaker, built engines, etc., on the land leased from the defendants, and drove a tunnel and gangways upon the land leased of plaintiff. Under authority from the Brittains these rails were laid in track, in the tunnel and gangways. Subsequently all the Brittains' leasehold interest acquired from the defendants was sold at sheriff's sale, under a mortgage. At the same time the sheriff also sold upon a *fi. fu.* all the right, title, and interest of the Brittains in the lease on the defendants' land, with the appurtenances, consisting, *inter alia*, of a breaker, schutes, screens, engines, slope-house, other buildings and machinery "and railroads, in, about and connected with said mines." At both sheriff's sales the property was purchased by one Repplier, under whom the defendants claim title to the rails. Whether these rails in question were included in the levy and sale was properly submitted to the jury and the points were correctly answered.

The fourth assignment of error is not sustained. Sufficient ground had not been laid to prove the contents of lost records; and the evidence offered was also irrelevant.

The remaining assignments of error relate to the charge of the court. The proof of plaintiff's purchase of the iron from De Haven, and his subsequent possession thereof, was so meager and unsatisfactory, that the court submitted it to the jury quite as favorably for the plaintiff as ought to have been

done. The rails were laid to facilitate the working of the mines under the tenancy. The tenant had the right to remove them during the term. De Haven went into possession under the Britains. He assigned to Dougherty, who was in possession at the time of the sheriff's sale. Dougherty at once gave up the possession to Repplier. All Repplier's interest in the property was purchased by the defendants. They took away the rails before the expiration of the term for which the plaintiff had leased the premises.

The jury has found that the rails were covered by the levy and sale. It is well settled that an engine or other machinery erected by a lessee to carry on the business in which he is engaged is personal property, during his term: *Lemar v. Miles*, 4 Watts, 330; *White's Appeal*, 10 Barr, 253. As such, they may be sold on execution, and the purchaser thereof may, like the tenant, remove them before the expiration of the term. Taking the charge as a whole we see no error therein.

Judgment affirmed.

DOBSCHUETZ ET AL. V. HOLLIDAY ET AL.

(82 Illinois, 371. Supreme Court, 1876.)

¹ Hoisting machinery belongs to lessee. A steam engine, machinery and fixtures attached to the soil by a lessee thereof, for the purpose of hoisting coal from mines, including all boxes and necessary appurtenances, remain a part of the lessee's estate.

Mechanic's lien against lessee's interest. Although under the lease the lessee has the privilege of removing his machinery and fixtures, yet an engine and fixtures attached to the soil are a part of the estate until severed, and a material man or mechanic furnishing or erecting the same, is entitled to a lien against the estate of the lessee therein.

Surrender by lessee. A voluntary surrender by the lessee can not divest such a lien when once attached.

Colorable forfeiture. The declaration of a forfeiture without cause of forfeiture proved, amounts (as against third parties) to no more than a voluntary surrender.

Purchaser becomes tenant. The owner of the fee neglecting to discharge the lien against the leasehold interest in such a case would be compelled to accept another tenant.

¹ *Foley v. Addenbrooke*, 13 M. & W. 174; *Post LEASE*.

¹Decree can not reach the fee. The decree against the leasehold interest can not be enlarged to reach beyond the leasehold interest including the tenant's improvements.

Appeal from the Circuit Court of St. Clair County; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Messrs. C. W. & E. L. THOMAS, for the appellants.

Messrs. WILDERMAN & HAMILL and Mr. JAMES M. DILL, for the appellees.

Mr. Justice SCOTT delivered the opinion of the court.

Petitioners contracted with the lessee in possession of the premises described, to build for him an engine, and do other work in constructing the necessary apparatus for hoisting coal from the mines he was about to open in the demised lands. There was a definite agreement as to the amount to be paid for the engine, and the time and manner of payment were fixed, but not as to the other articles to be furnished and the labor to be performed in setting the machinery. All other work was embraced in a different, contemporaneous agreement. One half the contract price of the engine was to be paid in cash, during the process of the work, and the other half, together with the amount and value of the other articles, to be paid in coal, at market rates, to be delivered in quantities within one year from the completion of the work. The lessee having refused to deliver any more coal under his agreement, it is now sought to establish a mechanic's lien against his interest in the premises and the improvements for the balance due.

Under our statute, the lien given in favor of the mechanic or material man is made to extend to an estate in fee, for life, for years, or any other estate, or any right of redemption, or other interest which the owner may have in the lot or land at the time of making the contract: R. S. 1874, Chap. 82, Sec. 2.

In this case the party with whom the contract was made was the owner of a leasehold estate limited in duration to twenty years, unless sooner terminated by the exhaustion of the coal in the mines demised. That interest it is sought to

¹Lessor's interest may become bound: *Gould v. Wise*, 2 West C. R. 405.

subject to a lien for the materials furnished and the labor done in erecting the superstructure and apparatus for hoisting coal from the mines.

No variance exists between the contract alleged and the one proven. All the agreement between the parties was not reduced to writing. Only that part that related to the engine, the amount and manner of payment, was the subject of a written agreement, while the remaining portion having reference to other materials to be furnished and labor to be performed in setting all the work in place on the premises, was by verbal contract.

One principal ground upon which the lien is resisted, so far as the engine is concerned, is, that it is personal property, and hence no lien exists under the statute. Whatever may have been the private agreement of the parties, it is very clear the engine, when set up and attached to the realty, as it was, became a part of the estate the lessee had in the premises. No doubt the parties could agree among themselves they would treat the engine and other fixtures as personalty, but their private agreement could not change the character of the property, so far as third parties were concerned. The engine and superstructure, when attached to the soil, became a part of the estate of the lessee, and unless expressly reserved would pass to his grantee with the estate: *Ombony v. Jones*, 19 N. Y. 234.

Under the agreement of the parties, the lessee had the privilege of removing all machinery and fixtures used in and about the mines in prosecuting the work, but until severed they constituted a part of the estate itself. Of this we think there can be no question.

No importance can be attached to that clause in the proposition to construct the engine "delivered aboard the cars at East St. Louis," in illustrating this branch of the case. It is a misapprehension to suppose those words indicate when the title to the property vested in the purchaser. All they mean in that connection is, that the makers, in addition to completing the engine, were, also, to deliver it on board the cars at East St. Louis, without additional charge above the contract price.

No grounds of the forfeiture of the lease are shown by the

evidence in the record. The witness, one of the lessors, states "we declared a forfeiture and took possession;" but it is apprehended under the decision in *Cheney v. Bonnell*, 58 Ill. 268, it was necessary to show that the facts warranted a declaration of forfeiture. Otherwise, the possession that followed will be treated as a surrender of the premises by the lessee to the lessors, and nothing more. The voluntary surrender to the owner of the fee can not affect the lien upon the estate of the lessee, which attached while he was the owner. Should the owners of the fee neglect to discharge the lien upon the consummation of the sale under the decree establishing it, they would be compelled to accept another tenant. After the surrender, the estate would still be subject to the burdens that rested upon it, as well as before. The merger of the estate of the lessee with that of the owners of the fee would not destroy the previous lien: *Gaskill v. Trainer*, 3 Cal. 334.

Evidence offered shows, with sufficient clearness, petitioners did work and furnish materials under the contract as alleged. The contract was with the owner, in the sense that term is used in the statute. As the materials and work became a part of the estate, no valid reason exists why petitioners should not have a lien for the unpaid balance due under the contract. It is the exact case where the statute gives the lien for the security of the mechanic and material man.

It is insisted upon as error, the decree orders payment of the amount found due to be made by the tenant with whom the contract was made, or by the owners of the fee to whom the tenant has since surrendered the premises, and in case of default of payment, all the interest of all the parties be sold. Only the leasehold estate, with the improvements made under the contract with the tenant, were sought to be subjected to the lien, and construing the decree as having no broader scope and as only intended to embrace the estate of the lessee which had become merged, by the surrender, with the estate of the owners of the fee, it was not irregular to decree that all the interests of all the parties in that estate be sold to satisfy the amount found due. That is all the court intended, as we understand the decree. With this limitation, which we think is plainly understood, the decree is strictly correct: *Kidder v. Aholtz*, 36 Ill. 478.

No order was made for an execution against the owners of the fee for any unpaid balance that might remain after the sale of the lessee's interest, and as they had not personally assumed to pay the debt, no such order could be rightfully made. It will be time enough to complain when the court shall assume to make such a decree. We can not anticipate the court will order an execution in a case where it would be inequitable to do so.

Respondent Kennedy filed a cross-petition, in which he alleges he made repairs on the engine and furnished materials, and made a box to be used in connection with the other machinery in hoisting coal from the mines, and asks that a lien be established in his favor for the value of the labor performed and materials furnished. Objection is taken that boxes used as this one was, constituted no part of the realty. This position seems to us to be untenable. These boxes are a necessary and indispensable part of the machinery for raising coal. Connected, as they are, with other machinery attached and made part of the realty, they become a part also. What reason can be assigned why such boxes, when so connected, are not as much a part of the realty as any revolving or other movable part of the engine, which, when attached to the soil, is a part of it? No distinction can be taken. Such boxes are a part of one system of machinery, each part being indispensable to the working of the other, and without which other parts would be utterly valueless for the purpose intended.

The decree is warranted by the law and the evidence, and must be affirmed.

Decree affirmed.

MOORE V. VALENTINE ET AL.

(77 North Carolina, 188. Supreme Court, 1877.)

¹ **Facts of the case**—**Machinery placed by purchaser under executory contract.** Vendee made contract to purchase mines, to receive title on payment of purchase money. He entered and put up machinery (engine, boilers, etc., affixed to the soil). He made default in payment of

¹ Intending lessee, failing to agree on terms, may remove fixtures placed pending negotiations: *Stout v. Stoppel*, 30 Minn. 56.

purchase money. Afterward the vendor became bankrupt and his estate was sold: *Held*, that this machinery passed to the assignee of the vendor.

Vendee can not remove fixtures, on default. An unconditional contract to purchase creates the relation of vendor and vendee, and such vendee making default is not entitled to remove additions to the land; otherwise if he had made a conditional contract of purchase.

Civil action tried at January term, 1877, of Mecklenburg Superior Court, before SCHENCK, J. This action was brought to recover a fund arising from the sale of a steam engine and its appurtenances, which were sold by consent of the parties to prevent injury from exposure.

The main question, however, presented by the pleadings and decided by this court was, whether said engine, etc., was a fixture to the freehold.

The facts found by His Honor are substantially as follows:

In October, 1867, one Davis sold to the defendant, Valentine, a tract of land in said county, contracting in writing to make title to the same upon payment of a certain sum of money. The land was purchased as mining property, and said defendant went into possession and put up machinery, that he might be able to carry on the mining operations more successfully. The machinery was placed in a house made for the purpose and firmly screwed down on wooden frames, and connected with the boilers outside the house by a steam pipe, and could not be gotten out without removing a portion of the house. The boilers could not be removed without tearing down the brick work encasing them.

The said defendant failed to comply with his part of the contract in the payment of a large amount of balance due for the purchase of said property.

In 1868, said Davis, the vendor, was declared a bankrupt, and his interest in balance of said purchase money, together with other effects as exhibited by his schedule, were regularly and legally sold by his assignee, and the plaintiff became the purchaser and obtained a deed conveying all the estate of said bankrupt.

The said defendant continued in possession under his contract of purchase, and claimed the engine and machinery as his property. The plaintiff also claimed them under his pur-

chase from said Davis' assignee, insisting that they were fixtures to the freehold and constituted a part of the land, and averring his readiness to make title to the same upon payment of balance of purchase money.

The engine and machinery were severed from the land, while said defendant was in possession under said contract of purchase, by his order and direction as well as the plaintiff's.

The opinion of His Honor which is set out in the case, concludes: "that as the defendant was a tenant in possession, under a written contract of purchase, and had erected these fixtures for the purpose of manufacturing, and severed them from the realty while in possession under the contract, that they thereby lost their character as fixtures, and again vested in the defendant as chattels."

Judgment was accordingly rendered for defendant, and the plaintiff appealed.

Messrs. WILSON & SON, for plaintiff, cited Hill on Fixtures; 2 Kent Com., 248; *Bryan v. Lawrence*, 5 Jones, 337; *Latham v. Blakely*, 70 N. C. 368; *Elwes v. Mawe*, 3 East, 38; *Smith v. Moore*, 26 Ill. 392; *McLaughlin v. Nash*, 14 Allen, 136; *Hemenway v. Cutler*, 51 Me. 407.

Messrs. SHIPP & BAILEY, for defendant, cited *Elwes v. Mawe*, 2 Smith's L. C. 228; *Van Ness v. Pacard*, 2 Peters, 145; *Moore v. Smith*, 24 Ill. 512; *Raymond v. White*, 7 Cowen, 319; *Niven v. Belknap*, 2 Johns. 573; *Love v. Edmonston*, 1 Ire. 152; *Jones v. Hill*, 64 N. C. 200; *Mason v. Williams*, 66 N. C. 564; *Saunderson v. Ballance*, 2 Jones, Eq., 322; *Sherrill v. Sherrill*, 73 N. C. 8.

PEARSON, C. J.

If Valentine had made a conditional contract of purchase as alleged in his answer, that is, if he had annexed a condition that, if upon testing the mine the result was not satisfactory, he should have the right to abandon the contract, his right to remove the engine and appurtenances would have been beyond any question. But upon the facts, he did not annex this condition, and made an unconditional contract of purchase, *i. e.*, he bound himself absolutely to pay the price, and was to have a deed when he made payment in full.

So the relation of vendor and vendee was established, and the fact that his purpose in buying was to "mine for gold" does not affect the question in the slightest degree. He took the mine, as parties do in marriage, "for better or for worse" no backing out about it.

Or, if he had taken a lease, say for five years, his right to remove the engine and appurtenances would have been beyond any question.

In both of these cases the nature of the estate proves that the erection of the fixture was for a temporary purpose, and not for the purpose of making it a part of the freehold. In such cases the fixture may be severed, and does not, in contemplation of law, become a part of the land.

When a mortgagor who is allowed to retain possession, or a vendee under a bond for title who is let into possession, makes improvements and erects fixtures, he does so for the purpose of enhancing the value of the property, and having made this *addition to the land*, he is not at liberty to subtract it on the ground that by his own default he is not able to get the title. If such was the law, a mortgagor in possession or a vendee in possession, who has erected a house, considering himself the absolute owner of the land, when he finds he can not comply with the condition, may move the house, or may dig up the trees that he has planted, and let the mortgagee and vendor take care of themselves. Such is not the law.

When a tree is planted, or a house is built, or a steam engine is annexed to the soil and is used as a part of the freehold, it becomes a part of the land and can not be severed except in special cases. His Honor concurs in this doctrine seemingly, but he excepts the case of a vendee who is let into possession and builds a house or makes other fixtures, on the idea that he is a tenant at will. It is true he is like unto a tenant at will in one particular—he may be turned out of possession at the will of the vendor if he fails to make the payments—but he is not like unto a tenant at will in other particulars; he owes no fealty as tenant; he is not liable for rent as for use and occupation; and, above all, he can not quit *at his own will*, but is bound by his contract of purchase and the notes given for the purchase money.

Our question is, does the one particular bring him within the exception made in favor of persons having a temporary estate, or do the three particulars exclude him from that class of persons? A bare statement answers the question. The vendee is the potential owner of the fee simple, and the addition made to the land was with the purpose to enhance its value, and that it should be permanent. Whereas, if a tenant for years or at will erects buildings, etc., it is not for the purpose of enhancing the value of the land, for he does not expect to become the owner, and his erections are for a temporary purpose and not with a view of making them a part of the land. Hence, for the encouragement of trade, manufacturing, etc., an exception is made in his favor and he is permitted to remove what had apparently become a part of the land.

His Honor also erred in the effect which he allows to the agreement by which the engine and its appurtenances were severed and sold. This did not in any way affect the rights of the parties; otherwise the plaintiff would not have consented to the severance, nor would his consent have been necessary. It is manifest that the sole purpose was to convert the engine and its appurtenances into money to prevent spoliation, and let the money stand in the stead of the engine, etc., as it was when annexed to the land, without affecting the rights of the parties in one way or another.

The effect given to this arrangement of the parties made for the sole purpose of preserving the property, so as to make it impair the rights of the plaintiff, and put the defendant in a better condition than he would have been in, had the engine, etc., been allowed to remain *in statu quo*; or had the plaintiff refused to give his consent to the conversion into money, will strike any one as a sequence by which Valentine gets benefit by a breach of good faith, and by giving to the agreement an effect beyond what was in the contemplation of the parties.

I have cited no authority because the principles are clear, and His Honor has *ex gratia* taken that labor upon himself.

Error. Judgment that plaintiff have the fund and recover his costs of the defendant, Valentine.

Judgment accordingly.

PER CURIAM.

BEWICK ET AL. V. FLETCHER.

(41 Michigan, 625. Supreme Court, 1879.)

Derrick not a fixture. Machinery was put up in a drill house on another's land for the temporary purpose of boring a salt well, and was removable without injuring the freehold. *Held*, that it was not a fixture and was not covered by a conveyance of the land.

Terms, imposed on removal, without consideration. Where machinery has not become a fixture the purchaser of the land can not impose terms on its removal by its owner, and if the latter agrees to terms without a consideration he is not bound by them or estopped from claiming title and possession.

Where no case, rulings immaterial. Where there is no cause of action it is not material whether rulings adverse to the plaintiff were or were not correct.

Error to Alpena. Submitted Oct. 8th. Decided Oct. 14th.
Trespass on the case. Plaintiffs bring error.

J. D. TURNBULL, for plaintiffs in error.

KELLEY & CLAYBERG, for defendant in error.

CAMPBELL, C. J.

Plaintiffs sued defendant in trover for the conversion of certain machinery which had once been in a drill house set up for boring a salt well in Alpena. The property where the machinery was first set up had been owned by one Lockwood. Fletcher made an arrangement with Lockwood whereby it was contemplated that he should furnish the machinery necessary for sinking a well and erect certain salt blocks and some other apparatus, in consideration whereof he was to have a half share in the land and the business. Fletcher put up the drilling machinery in question, but the well was not sunk and the arrangement was never carried out, and he made no transfer.

Lockwood sold the land to plaintiffs. Their only title to the property depends on its having become appurtenant to the land, or on a subsequent contract from Fletcher, which will be presently referred to. If not a part of the realty, Lockwood could not have sold it to them, and did not in fact make any assignment of any different character.

It is not important to look into the very elaborate and extended discussion of the doctrine of fixtures contained in the charges and requests, because the facts do not require it. The machinery was put upon the ground to sink a well, which is a temporary purpose. It was not so attached to the freehold as not to be removed without injury, and therefore, on well-settled principles, it could not become realty without being either intended or especially adapted for permanent use as a part of the freehold. There is nothing in the case to indicate this, and the jury, if there had been, were properly directed on this head. There is no presumption of such a union. The presumption is all the other way: *Wheeler v. Bedell*, 40 Mich. 693.

The plaintiffs, however, claim that Fletcher is estopped by a subsequent arrangement, from denying their right. After the Lockwood project was abandoned, it was desired to use this machinery to sink a well for other parties, and Fletcher removed part, and was preparing to remove the rest, against plaintiffs' objections, when they entered into an amicable contract, signed by Fletcher, whereby he promised to return the property and replace it in the same condition after the new well was finished if they would let him remove it.

We think it very clear that this agreement can not be construed into anything more than a promise to put the property back where it was before. It is no relinquishment of right, and no recognition of any title in plaintiffs.

If Fletcher owned the property they had no right whatever to impose terms, and there was no consideration for any contract on his part to give up either title or possession.

There was nothing in the case to sustain the plaintiffs' claim, and the correctness and incorrectness of some of the rulings can make no difference in the result.

Judgment must be affirmed with costs.

The other justices concurred.

WAKE ET AL. V. HALL ET AL.

(Law Reports, 7 Queen's Bench Division, 295. Court of Appeal, 1880.)

- ¹ **Removal of mining improvements by miner under mining customs of the King's Field.** Before the time of legal memory the customs of the King's Field existed, and, established by statute, exist to this day. Under them the lands were free to all persons to search for and work mines of lead, paying certain royalties. And as to their improvements, the miners have rights analogous to the right of an owner in fee to enter and remove buildings, when he has sold land excepting the buildings.
- Idem.** A miner who has erected buildings, reasonably necessary for working his mine, is entitled, as against the surface owner, to pull down and remove the same at any time while he continues to work, or within a reasonable time after he has ceased to work; but he is not entitled to remove them after he has allowed such reasonable time to expire.

The plaintiffs are land owners in the Liberty of Hucklow, in the district of the King's Field, in the Hundred of the High Peak of Derbyshire, and within the limits of the High Peak Mining Customs and Minerals Courts Act, 1851. The defendants are owners of a lead mine, situate under the plaintiffs' soil, and deriving their title to such mine from the customs set out in the schedule to the above mentioned act. The defendants had, prior to 1872, for the purposes of their mines and in the exercise of their rights under such mining customs, erected upon the plaintiffs' land an engine house, boiler house, and other buildings, all of them being built of brick or stone, and with foundations sunk to a considerable depth.

In 1872 they ceased to work the mine, and in 1873 and 1874 they pulled down such of the above mentioned buildings as contained fixed and unfixed machinery, and sold the building materials and the machinery, both fixed and unfixed. Later on, in the year 1874, they converted certain other of the above buildings (which were still standing) to purposes wholly unconnected with the mine, and continued to use them for such purposes down to action brought.

The defendants never resumed the working of their mine, but no notice of forfeiture had, at the date of action brought, been given to them by the barmaster.

¹As to the King's Field, see *Arkwright v. Cantrell*, 7 Ad. & El. 585; *Atty. Gen. v. Wall*, 4 Br. Par. Ca. 665.

In 1878 the plaintiffs brought the present action to recover possession of the land occupied by the defendants' buildings, together with the buildings still standing on it, and also to recover damages for trespass in pulling down the buildings pulled down in 1873 and 1874. The action was tried before Lord COLERIDGE, C. J., without a jury. His lordship held that the plaintiffs were entitled to recover possession of the land and buildings still standing on it, but gave judgment for the defendants on the residue of the claim.

Both parties appealed.

MELLOR, Q. C., and C. GOULD, for the plaintiffs.

GRAHAM, for the defendants.

Lord SELBORNE, L. C.

The plaintiffs' appeal in this case raises the question, whether the defendants were entitled (as Lord COLERIDGE has held) to pull down and remove the materials of an engine house, boiler house and other buildings (all of them brick or stone structures, with foundations sunk to a considerable depth), which they erected for mining purposes upon the plaintiffs' land, within a district called the "King's Field," or the "King's Fee," in the Hundred of the High Peak of Derbyshire.

The Hundred and the mineral duties in this and some other parts of it belong to the Crown in right of the Duchy of Lancaster, and there can be no doubt that the "King's Field," or "King's Fee," was anciently Crown property. Before the time of legal memory (as appears from a statute passed in 1851) there were certain mineral laws and customs in force throughout this district, with courts to administer them, which (as amended and established by that statute) subsist to this day. By these laws and customs any subject of the realm was entitled to search for and to work any mines or veins of lead ore which might be found within the district, paying royalties to the Crown or its lessees. Such laws, customs and courts could not have originated otherwise than by grant, license or other authority of the Crown while it retained the ownership of the soil; and all grants of lands within the dis-

trict must be taken to have been made by the Crown subject to those laws and customs and to the mining rights thereby conferred or recognized. The effect practically was to except out of all such grants, and to reserve to the Crown all mines and veins of lead within the district, to be worked by such persons as should entitle themselves so to work according to the custom, on payment or render to the Crown of its accustomed dues and royalties.

The plaintiffs' title to the land, on which the buildings in question were erected, can not (in my opinion) stand higher than that of a grantee subject to such an exception and reservation; and I consider the title of the defendants, who were miners, working under and according to the custom (as their predecessors had been in the same place, on the same vein for two centuries), to have been substantially equivalent to that of licensees, admitted by the proper officers of the Crown to work the minerals reserved to the Crown, and to exercise all privileges incident by the custom to the right of working such minerals.

Under the act of 1851 and the customs scheduled to it (which were thereby established as the only conditions to be thenceforth in force against owners of the soil), books were to be kept by an officer, called the "barmaster," for the registry of mineral titles, acquired by gift or transfer, in the customary way. Every one was to be at liberty to search for veins of lead ore "under all manner of lands, of whose inheritance soever they might be," upon certain conditions. When any new vein was found, the "first finder" was to have measured and set out to him, by the barmaster, in the presence of two grand jurors, "two mears in length of the vein," and a third "mear" (it is not necessary to state its dimensions) was at the same time to be allotted to the Crown lessees, or (if there were none) to the Queen.

If neither the Crown lessees nor the Queen chose to work this third "mear," the "first finder" was to be entitled either to purchase it from the Crown on certain terms, or to work through it, reserving the ore found there (less expenses) for the Crown. Every person working any such vein was to pay duties, called "lot and cope," to the Crown; and the customs made careful provision for the manner of ascertaining them.

No render of any kind was to be made to the land owner, who, if he should himself desire to work any vein of lead within his own land, had no greater or better right than that which was open under the custom to all the Queen's subjects; and if he worked the mines at all he could only do so upon the customary terms, and on payment of the customary royalties.

The fourth and fifth customs, scheduled to the act, define the miner's surface privileges. Under the fourth, they were to have set out for their use by the barmaster, without any compensation to the occupiers or land owner, ways from the mine to the nearest highway, and also to the nearest running stream, spring, or natural pond, such ways, and also the water of such stream, etc., to be used by them for mining purposes only; and "all rights of way to cease when the mine should be no longer worked." The fifth custom (so far as material) is in these words: "Every miner shall, so long as his mine shall be worked, be entitled, without making any payment for the same, to the exclusive use of so much surface land as shall be thought necessary by the barmaster and two of the grand jury, and be set out by them, for the purpose of laying rubbish, dressing his ore, briddling, making mears or ponds, and conveying water thereto, and any other mining purposes." It is not disputed that, under these wor.'s, the miner was entitled to erect upon the surface so set out for his exclusive use, any buildings necessary or proper for mining purposes, such as those now in question are admitted to have been; and the buildings in question were in fact created for such legitimate mining purposes upon surface ground so appropriated for the exclusive use of the defendants, or of their predecessors in title, while working their mine according to the customs.

Among the admissions entered into between the parties at the trial, is one to this effect: that "it has been the practice in the district for miners to erect buildings and fix machinery similar to the buildings and machinery of the defendants, for mining purposes, and from time to time to alter and vary the description and character of the buildings and machinery, as improvements have been discovered and introduced." This is, in my judgment, material—not, indeed, as adding anything to the scheduled customs (which would be contrary to the statute), but as showing how the fifth of the scheduled cus-

toms has been always, in practice, understood and acted upon.

Two more only of the scheduled customs require to be mentioned. The nineteenth provides that if the barmaster "finds any mine or vein neglected and not wrought, and not hindered by water or for want of air," he may, "if required so to do by any person or persons," give notice that "the mine will be forfeited at the expiration of three weeks, if not duly and reasonably worked to the satisfaction of the barmaster and grand jury, and no other sufficient reason assigned to them;" and that if, at the expiration of that time, the mine or vein is not so worked, the barmaster may then "give such mine or vein to any person or persons willing to work the same."

The second custom gives the land owner power to sell and dispose of "the calk, feagh, spar, and other minerals and rubbish (except lead ore), and to remove the same from his land, *so soon as the lead ore has been extracted from it*, when and as often as he thinks proper, and when not required for the use of the mine, but not so as to destroy or injure any mineral property, without the consent of the barmaster and two members of the grand jury." The term "mineral property," under the interpretation clause of the act, includes "the works, rights and appurtenances connected with mines and veins of lead, and also lead ore."

No notice of forfeiture was given to the defendants under the nineteenth custom. They worked their mine down to June, 1872, and, according to the admissions on both sides, they then "suspended working the mine;" but it remained till the commencement of the action (I still refer to the admissions) "in the possession of the defendants, and registered in their names in the barmaster's books." In 1873 and 1874 they pulled down the buildings in question and sold the materials, together with the fixed and unfixed machinery which the buildings had contained. In 1874 they converted other buildings (still standing upon the land) to uses unconnected with mining; and they continued so to use the latter buildings till the action was brought. The working of the mine was never resumed; the fact being that, although not exhausted, it had ceased to be remunerative. There were

upon the ground, till after 1874, divers hillocks of material raised from the mine, composed of spar and other mineral substances containing lead capable of being extracted; and it had been the practice of the defendants and their predecessors, and of the district generally, to work and re-work such "hillocks" by certain processes for the purpose of extracting the lead contained in them.

Upon these facts—reasoning in some degree from the analogy of the law of removable fixtures, but more (as it seems to me) from the special nature of the customs, and endeavoring to interpret those customs on points where they were not explicit, and in the absence of authority "so as to do justice"—Lord Coleridge has held that the miners "having erected (possibly very expensive) machinery and machine-houses, in the exercise of their own rights, and without any reference to a bargain with the land owner," had a right to remove them at any time prior to a complete abandonment of the mine. The point, as far as I know, is new. It ought, in my opinion, to be determined on the same principles as if similar buildings had been erected, and afterward removed, by an owner in fee simple of minerals reserved and excepted by a deed granting land subject to such exception and reservation, with powers for the mineral proprietor to use the surface of the land for all purposes incident to the working of the mines, including the erection, for those purposes, of buildings of this character. The rights of the Crown, and of the miners, whom I regard as (in substance) licensees of the Crown under the High Peak customs, seem to me to stand upon the same footing.

Not much light for the determination of this question is (in my judgment) derivable from the law of removable fixtures. Buildings of this character are certainly not removable fixtures as between landlord and tenant, without a contract to that effect (unless they come within the 3d section of 14 and 15 Vict., c. 25), whether they are erected for trade or for any other purpose. I do not dwell upon this (which I have always understood to be clear law) because it is very satisfactorily dealt with by the able judgment of Vice-Chancellor KINDERSLEY, in *Whitehead v. Bennet*, 27 L. J. (N. S.), Ch. 474, cited by Mr. MELLOR in reply. But the question in the present case, where the devisee has no estate at all in the land,

where he is neither tenant nor trespasser, but has a right paramount to the title of the land owner, to impose upon the surface, for the purposes of his mining operations, the burden of carrying such buildings and machinery as may be necessary and proper for those operations as incident and appurtenant to his own mining property, appears to me to be entirely different.

As between landlord and tenant, the tenant makes the buildings which he erects part of that land in which he has himself an estate in possession, the reversion being in the landlord. It is by virtue of his tenure of the land, and of the terms of that tenure, that he is (on the one hand), enabled to erect such buildings, and (on the other hand) prevented from pulling them down. He can not commit waste, and that is the only reason that I am aware of why he can not pull them down and remove them during his term. The principle is so stated by Lord ELLENBOROUGH in the case (referred to during the argument) of *Elwes v. Maw*, 3 East, 38. "The general rule," he says, "on this subject is that which obtains between heir and executor; and that rule (as found in the Year Book, 17 Edw. 2, 518) is, that where a lessee, having annexed anything to the freehold during his term, afterward takes it away, it is waste."

But between the miner and the land owner, under the High Peak customs, there is no privity of title. The miner does not hold of the land owner; he has an easement over the land entitling him for particular purposes to use the surface; he puts there what he pleases (for those purposes) in the exercise of that dominant right, and he may (as it seems to me) by virtue of the same right also remove it; he is not a trespasser in so doing; the doctrine of waste is inapplicable to this case. In the absence of any positive law or judicial authority applying to such a case the maxim, "*quid quid plantatur solo, solo cedit*," I think that reason and principle are against so applying it. Why should these erections, created with the miner's money for the miner's purposes as incident to his mineral property, be treated, not as part of that property, but as accretions to the estate of the land owner, who is a stranger to it?

Why should not the miner's right to the exclusive use of that part of the surface, enable him to do with the materials

which he has placed upon it, whether structures of brick and stone or anything else, and whether fixed into the ground or not, whatever is necessary or convenient for the purposes of his mining operations, so long (at all events) as those operations continue. How can it be consistent with the purpose for which he has this right, that the land owner should be entitled to come in and to say, this is part of my land—you have made it so—it is now mine, and not yours? If the mine owner has the right of alteration and removal during the continuance of the mining operations, I find nothing in the customs of the High Peak from which I can infer that he will not be entitled also to remove the same buildings at the close of those operations, provided he does so within a reasonable time, and before his surface rights have so come to an end, as to make him a trespasser in law by remaining upon the land. The inferences suggested to my mind by the custom are all in the opposite direction. By the second custom the land owner's right to take away rubbish from which the lead has been extracted is limited, so that no injury be done (without consent of the barmaster) to the mineral property, which in the sense of the act, includes all the work and appurtenances connected with the mine. Under the tenth custom, whatever is the law on this subject as to an ordinary miner, must (I suppose) be equally the law as to the Queen, if working by Her Majesty's own officers, the third near reserved to the Crown. Under the nineteenth section the mine may be forfeited, and at the same instant of time may be given by the barmaster to another miner; nor do I see what there is to prevent the barmaster from simultaneously continuing to the succeeding miner under the fifth custom, the same exclusive surface rights, over exactly the same space of land which had been enjoyed by the person who incurs the forfeiture.

It is not pretended that the succeeding miner is in that case to have the benefit of the buildings erected with his predecessor's money without paying for them, or that the land owner (who is excluded from the use of that part of the surface, and may so continue, as the facts of this case show, for centuries) is either then to come in and take down these buildings or to receive compensation from the incoming miner for allowing them to remain.

The true implication from the fact that they were created by virtue of, and were merely incidental to, a right to the exclusive use of the surface by a person who has ceased to have that right, seems to me rather to be that he not only may, but ought to remove them, if he is required so to do by the person (whether miner or land owner) who succeeds to that right. If not required so to do, he may either make his own terms with the succeeding miner or with the land owner, or, if he thinks it better to abandon than to remove them, he may take that course.

In the present case the buildings were, in fact, removed while the defendants remained in possession, no forfeiture having been declared and no conclusive act having been done showing any purpose of abandonment, and there being at that time still upon the ground hillocks forming part of the mineral property from which lead might have been extracted. The fifth custom does not say that the miner shall immediately become a trespasser upon the surface when he ceases to work the mine, but only that his right to the exclusive use of it without payment is to be "so long as the mine shall be worked." The 19th custom proves that a forfeiture is not *ipso facto*, incurred at the very moment when the working ceases, even when there is such a neglect to work as is, under that custom, a just cause of forfeiture.

I can not hold that at the time when these buildings were removed there had been any such complete abandonment of the mine (in which there was still lead ore, and which had been in work for 200 years) as to make the defendants trespassers. My conclusion, therefore, on the important question raised by the plaintiffs' appeal is the same with that of Lord COLERIDGE, and I think that the appeal should be dismissed with costs.

Upon the cross-appeal I do not consider it necessary to say much. There was no forfeiture declared under the 19th custom, but I think that by pulling down and removing the engine-house, and other buildings necessary for working the mine, and converting the buildings which remained into stables for horses, and letting them for purposes unconnected with mining operations, the defendants showed conclusively their intention to abandon the mine, and that, having done

so, they had no longer any right to use the surface land which had been allotted to them under the 5th custom, or to remain in possession of it for other than mining purposes. I think that after that time they have been properly treated as trespassers, and as having abandoned to the land owner the buildings which they neglected to remove while they had the right to do so. I hold that any such removal ought to be either during the continuance of the surface privileges, or at least within a reasonable time after their cessation. The cross-appeal, therefore, must also be dismissed with costs.

BAGGALLAY & BRETT, L. JJ., concurred.

Appeals dismissed.

1. When lease is forfeited, fixtures go to the landlord: *Davis v. Moss*, 38 Pa. St. 346; *Contra, Sumner v. Bromilow*, 34 L. J. Q. B. 130.

2. Salt kettles affixed to freehold, but easily removed. *Held*, personalty. Things removable without serious damage to the freehold, and removable without substantially destroying their own value, do not go with the realty: *Ford v. Cobb*, 20 N. Y. 344.

3. Lessor's privilege to purchase trade fixtures reserved in lease does not prevent a levy on them by the lessee's creditors: *Lemar v. Miles*, 4 Watts, 330.

4. Lien for purchase money of engine upheld against mortgage upon the property to which it was affixed: *Tibbetts v. Moore*, 23 Cal. 203; *Post LIEN*.

5. Fire engine set up for benefit of the estate by tenant for life, *held*, to be his personal estate: *Lawton v. Lawton*, 3 Atkyns, 13.

6. Salt pans not joined to the walls of the salt works, but fixed with mortar to a brick floor, *held*, to go to the heir instead of the executor: *Lawton, Exr., v. Salmon*, 1 H. Black. 259, note.

7. Covenant that lessee would deliver machinery, etc., to lessor upon expiration of lease and payment of their value, not enforced: *Talbot v. Ford*, 13 Simons, 173; *Post LEASE*.

8. A trough carrying water to wash ore is an "erection used in conducting the business of the mine," under the riot act: *Barwell v. Winterstroke*, 14 Q. B. 704.

9. Smelting machinery held to be fixtures, as against mortgagor: *Thomas v. Davis*, 76 Mo. 72; 43 Am. R. 756.

¹RYLANDS ET AL. V. FLETCHER.

(L. R., 3 H. L. 330. House of Lords, 1868.)

²**Owner liable for action of water brought on his land.** Where the owner of land without willfulness or negligence uses his land in the ordinary manner of its use, though injury should thereby be occasioned to his neighbor he will not be liable in damages. But if he bring upon his land anything which would not naturally come upon it and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal willfulness or negligence, he will be liable in damages for any mischief thereby occasioned.

Application of the rule—Reservoir tapped—Mine drowned. A was the lessee of mines. B was the owner of a mill standing on land adjoining that under which the mines were worked. B desired to construct a reservoir and employed competent persons for that purpose. A had worked his mines up to a spot where were certain old passages of dis-used mines; these passages were connected with vertical shafts which communicated with the land above, and were apparently choked with marl and earth. No care was taken in building the reservoir to block these shafts, and shortly after water had been introduced into the reservoir it broke through some of these shafts, flowed through the old passages and flooded A's mine. *Held*, that B was liable to A for the damage so caused.

This was a proceeding in error against a judgment of the Exchequer Chamber, which had reversed a previous judgment of the Court of Exchequer.

In November, 1861, Fletcher brought an action against Ryland & Horrocks, to recover damages for an injury caused to his mines by water overflowing into them from a reservoir which the defendants had constructed. The declaration contained three counts, and each count alleged negligence on the part of the defendants; but in this house the case was ultimately treated upon the principle of determining the relative rights of the parties, independently of any question of personal negligence by the defendants in the exercise of them.

The cause came on for trial at the Liverpool summer as-

¹ See this case reported on its trial in the Court of Exchequer in 3 H. & C. 774; in the Exchequer Chamber, L. R., 1 Ex. 265. All these decisions are reprinted in 1 Thompson on Neg., 2, where the case is fully annotated.

² *Fletcher v. Rylands*, 5 M. R. 78.

sizes of 1862, when it was referred to an arbitrator, who was afterward directed, instead of making an award, to prepare a special case for the consideration of the judges. This was done, and the case was argued in the Court of Exchequer in Trinity term, 1865.

The material facts of the case were these: The plaintiff was the lessee of certain coal mines known as the Red House colliery, under the Earl of Wilton. He had also obtained from two other persons, Mr. Hulton and Mr. Whitehead, leave to work for coal under their lands. The positions of the various properties were these: There was a turnpike road leading from Bury to Bolton, which formed a southern boundary to the properties of these different persons. A parish road, called the Old Wood Lane, formed their northern boundary. These roads might be described as forming two sides of a square, of which the other two sides were formed by the lands of Mr. Whitehead on the east, and Lord Wilton on the west. The defendants' grounds lay along the turnpike road, or southern boundary, stretching from its center westward. On these grounds were a mill and a small old reservoir. The proper grounds of the Red House colliery also lay, in part, along the southern boundary, stretching from its center eastward. Immediately north of the defendants' land lay the land of Mr. Hulton, and still farther north that of Lord Wilton. On this land of Lord Wilton, the defendants, in 1860, constructed (with his lordship's permission) a new reservoir, the water from which would pass almost in a southerly direction across a part of the land of Lord Wilton and the land of Mr. Hulton, and so reach the defendants' mill. The line of direction from this new reservoir to the Red Colliery mine was nearly southeast.

The plaintiff, under his lease from Lord Wilton, and under his agreements with Messrs. Hulton and Whitehead, worked the mines under their respective lands. In the course of doing so, he came upon old shafts and passages of mines formerly worked, but of which the workings had long ceased; the origin and the existence of these shafts and passages were unknown. The shafts were vertical, the passages horizontal, and the former especially seemed filled with marl and rubbish. Defendants employed for the purpose of constructing

their new reservoir persons who were admitted to be competent as engineers and contractors to perform the work, and there was no charge of negligence made against the defendants personally. But in the course of excavating the bed of the new reservoir, five old shafts, running vertically downward, were met with in the portion of the land selected for its site. The case found that "on the part of the defendants there was no personal negligence or default whatever in or about, or in relation to, the selection of the said site, or in or about the planning or construction of the said reservoir; but, in point of fact, reasonable and proper care and skill were not exercised by, or on the part of, the persons so employed by them, with reference to the shafts so met with as aforesaid, to provide for the sufficiency of the said reservoir to bear the pressure of water which, when filled to the height proposed, it would have to bear."

The reservoir was completed at the beginning of December, 1860, and on the morning of the 11th of that month the reservoir, being then partially filled with water, one of the aforesaid vertical shafts gave way, and burst downward, in consequence of which the water of the reservoir flowed into the old passages and coal workings underneath, and by means of the underground communications then existing between them and the plaintiff's workings in the Red House colliery, the colliery was flooded and the workings thereof stopped. The question for the opinion of the court was whether the plaintiff was entitled to recover damages by reason of the matters hereinbefore stated. The Court of Exchequer, Mr. Baron BRAMWELL dissenting, gave judgment for the defendants (3 H. & C. 774). That judgment was afterward reversed in the Court of Exchequer Chamber (4 Ibid. 263; Law Rep. 1 Ex. 265). The case was then brought on error to this house.

Sir R. PALMER, Q. C., and Mr. T. JONES, Q. C., for the defendants (now plaintiffs in error):

In considering this case it is important to remember that the communications between the workings of the plaintiff and the old shafts and pits were not known to the defendants. The question, therefore, is, whether they can be held responsible for an injury which, as the possible cause of it was un-

known to them, they could not by any care on their part prevent. It is submitted that they are not liable. Every man has a right to use his own land for lawful purposes, and if he does so, and does so without knowledge that he will thereby occasion injury to another, he can not be held responsible should injury occur. For that is a case which comes within the legal description of *damnum absque injuria*. The principle adopted by the Exchequer Chamber here, that though a man uses his lawful rights without malice and without knowledge of danger, he may still be liable for any mischief occurring from such use, is too wide. It would make every man responsible for every mischief he occasioned, however involuntarily, or even unconsciously. Now knowledge of possible mischief is of the very essence of the liability incurred by occasioning it: *Acton v. Blundell*, 12 M. & W. 324; *Chasemore v. Richards*, 7 H. L. C. 349. That has always been recognized as one of the principles of our law, and has, as such, been adopted by the courts in America.¹

¹ *Pixley v. Clark*, 32 Barbour's Reports (New York). The head-note of the case is as follows: "Individuals owning the bed of a stream, and each bank thereof, have the right to build a dam and embankment, and raise the water of the stream as high as they please, subject only to the restriction resting upon all, so to enjoy their own property as not to injure that of another person, with the qualifications and limitations incident to that right of property.

"And if they, in the exercise of that right, build with due care an embankment to prevent the water, when raised by their dam above the natural bank of the stream, from overflowing the lands of adjacent owners, and in consequence of raising their dam the water finds its way through their own natural soil and below the surface thereof, by filtration, percolation, or otherwise, to the land of an adjacent proprietor, the owners of such dam and embankment are not, in the absence of any unskillfulness, negligence, or malice, liable to such adjacent proprietor for any damage he may sustain thereby, the injury being *damnum absque injuria*.

"A party is liable for any defect in his artificial erections which might have been remedied by reasonable care and skill, but not for any defect in the natural banks of a stream.

"Where persons have the right to use the waters of a stream for manufacturing purposes, the right to dam the water and detain it a reasonable time follows as a necessary incident to the right of user; and they can not be compelled to make an artificial reservoir for that purpose.

"The banks of the stream are theirs for that purpose; and so long as the water is only nominally detained for this lawful, customary, and proper purpose, the adjacent land owners must submit to the indirect and consequential damages resulting to their lands from such use."

Smith v. Kenrick, 7 C. B. 515, showed that where two rivers lay contiguous to each other, but neither was subject to a servitude to the other, each owner had a right to work his mine in the best way for his own benefit, and, if he did so without negligence, was not liable to the other for prejudice to his property which might thereby arise. That case is very important, for there knowledge existed which it is not pretended existed here. In the time of Bracton the rule existed that injury created to one man by the lawful act of another, if that act was done without willfulness or negligence, would not afford a title to a claim of damages: Bract. bk. 4, c. 37, fol. 221. That must be the rule in the present day, for otherwise no man could use his property, however carefully, without being liable to pay damages for mischief which, without any fault or even any knowledge of his own, might afterward occur. *Chadwick v. Trower*, 6 Bing. N. C. 1, gives the answer to that proposition. There it was held that a man who pulled down his own wall was not bound to give notice to his neighbor of his intention to do so, and was not liable to that neighbor in damages merely because, in pulling it down, he damaged an underground wall of his neighbor's, of the existence of which he had no knowledge. That case, so far as principle is concerned, exactly resembles the present. *Tenant v. Goldwin*, 1 Salk. 360, 2 Ld. Raym. 1089, does not affect the defendants here, for there all the facts were fully known to both parties, and the court merely decided that, that being so, the defendant was bound to keep his own property in such a state that it should not injure his neighbor. *Bagnall v. The North-Western Railway Company*, 7 H. & N. 423, 1 H. & C. 544, at first sight appears much nearer the present case; but there all the facts as to the condition of the soil and the parts worked through were known, and in that respect, therefore, the difference between the two cases is complete. The want of knowledge here is an essential ingredient in the case. The principle laid down by Mr. Baron BRAMWELL in this case, that a man in the use of his own property must take care that he does not injure that of his neighbor, is true in itself, but can not be applied to a case like the present, where the injury which happens

is merely consequential, and is the result of circumstances as to which neither knowledge of them, nor negligence in providing against them, can be imputable to the defendants. Indeed, the fault, if any, is with the plaintiff. He began the work in his mines some years ago, and in the progress of it he came to know of these passages. He ought to have communicated his knowledge of them to the defendants, who might then have provided against this mischief, but he did not. The obligation to give notice of the circumstances, if they were to be relied on as creating any liability in another party, was recognized in *Partridge v. Scott*, 3 M. & W. 220. Here, too, the defendants employed competent persons to do something which was in itself perfectly lawful, and they can not be held liable in damages without clear evidence of impropriety or negligence on their own parts. The person who actually does the work is alone liable: *Baker v. Hunter*, 31 L. J. (Ex.) 214; 7 H. & N. 1; *Richards v. Hayward*, 2 Man. & G. 575; *Peachey v. Rowland*, 13 C. B. 182; *Allen v. Hayward*, 7 Q. B. 960. *Sutton v. Clarke*, 6 Taunt. 29, is clearly in favor of the defendants. No pretense for setting up this charge of neglect was suggested in this case. On the facts, therefore, as well as on the principles of law, the judgment against the defendants can not be supported.

Mr. MANISTY, Q. C., and Mr. J. A. RUSSELL, Q. C., for the plaintiff below (now the defendant in error).

The mines here were worked in the ordinary way, and their owner is entitled to be protected against a flow of water which destroyed his works, and which was occasioned by the act of others. If the water had come into his mine from natural causes alone, he could not have complained; but it came in through the act of the defendants in making their reservoir. They introduced there water which would not have come there in a natural way, and they were therefore bound to see that it did not produce mischief to any one. They brought the mischief on the land, and they were bound to guard against the consequences. *Baird v. Williamson*, 15 C. B. (N. S.) 376, really disposes of this case, on the

ground of the distinction between water flowing on to land, from natural gravitation, and water brought there through the act of an adjoining land owner. *Smith v. Kenrick*, 7 C. B. 515, had established that each of two mine owners might work his own mine in the ordinary and proper way and that if, from such working, and without negligence on the part of the one, an injury was occasioned to the property of the other, the former was not liable. That proposition is not contested, but that case implied that if the injury was occasioned by something which was not ordinary working, the injury thereby occasioned would be the subject of a claim for damages. Here the construction of the reservoir was not an ordinary working of the property of the defendants. *Baird v. Williamson*, completed what *Smith v. Kenrick* had left deficient, and the two, taken together, established beyond all question the title of the plaintiff here to recover damages. The case of *Sutton v. Clarke* merely decided that a public functionary acting to the best of his judgment and without malice, and obtaining the best assistance he can, is not liable to a claim for damages if what he does operates to the prejudice of an individual. That case does not affect the present, except that it indirectly confirms the doctrine now contended for, namely, that though the act was in itself lawful, yet if the doing of it occasions an injury to any one, the person injured has a right of action. The principle that an injury, though only consequent on an act, and not developing itself till some years after the act done, may still be the subject of a claim for damages, was settled in *Backhouse v. Bonomi*, El. Bl. & El. 622, 9 H. L. C. 503, and there the act which occasioned the injury was in itself a lawful act, and there had been nothing but the mere ordinary working of the mines, yet as it resulted in a mischief to the property of other people, it was held to be a subject for compensation. In *Hodgkinson v. Ennor*, 4 B. & S. 229, the defendant had polluted a stream by works on his own land, which works were not in themselves illegal, but they were not the natural mode of working the property, and they produced a mischief to his neighbor; he was therefore held responsible in damages. Lord Chief Justice COCKBURN there said, that it was a case in which the maxim, "*sic utere tuo ut alienum*

non laedas" applied; and Mr. Justice BLACKBURN declared "the law to be as in *Tenant v. Goldwin*, that you must not injure the property of your neighbor, and, consequently, if filth is created on any man's land, 'he whose dirt it is, must keep it that it may not trespass.' " Making a shaft to a mine is, no doubt, a part of the proper and ordinary way of working mining property, but the shaft must be so made and fenced that it shall not occasion injury to the property of others, and if not so made and kept, any injury thereby occasioned must be compensated: *Williams v. Groucott*, 4 B. & S. 149; and *Imperial Gas Company v. Broadbent*, 7 H. L. C. 600, went altogether on that principle; so did *Bamford v. Turnley*, 3 B. & S. 62, and *Tipping v. St. Helen's Smelting Company*, 4 B. & S. 609, 11 H. L. C. 642.

As was said in *Lambert v. Bessey* (Sir T. RAYM., 421), "if a man doeth a lawful act, yet if injury to another ariseth from it, the man who does the act shall be answerable;" and many illustrations of the principle are there given. Every one of them justifies the argument which seeks to fix liability on these defendants.

The mill owners are liable here, though they employed a competent engineer and contractor, and were not themselves guilty of any personal negligence. The principle, *qui facit per alium facit per se*, applies here, and the principal is liable for the negligence of his agent: Paley, Pr. & Ag. 262; *Pickard v. Smith*, 10 C. B. (N. S.) 470.

Mr. T. JONES replied.

The Lord Chancellor (Lord CAIRNES).

My lords, in this case the plaintiff (I may use the description of the parties in the action) is the occupier of a mine and works under a close of land. The defendants are the owners of a mill in his neighborhood, and they proposed to make a reservoir for the purpose of keeping and storing water to be used about their mill upon another close of land which, for the purposes of this case, may be taken as being adjoining to the close of the plaintiff, although, in point of fact, some interven-

ing land lay between the two. Underneath the close of land of the defendants on which they proposed to construct their reservoir, there were certain old and disused mining passages and works. There were five vertical shafts, and some horizontal shafts communicating with them. The vertical shafts had been filled up with soil and rubbish, and it does not appear that any person was aware of the existence either of the vertical shafts or of the horizontal works communicating with them. In the course of the working by the plaintiff of his mine, he had gradually worked through the seams of coal underneath the close, and had come into contact with the old and disused works underneath the close of the defendants.

In that state of things the reservoir of the defendants was constructed. It was constructed by them through the agency and inspection of an engineer and contractor. Personally, the defendants appear to have taken no part in the works, or to have been aware of any want of security connected with them. As regards the engineer and the contractor, we must take it from the case that they did not exercise, as far as they were concerned, that reasonable care and caution which they might have exercised, taking notice, as they appear to have taken notice, of the vertical shafts filled up in the manner which I have mentioned. However, my lords, when the reservoir was constructed and filled, or partly filled, with water, the weight of the water bearing upon the disused and imperfectly filled up vertical shafts, broke through those shafts. The water passed down them and into the horizontal workings, and from the horizontal workings under the close of the defendants it passed on into the workings under the close of the plaintiff, and flooded his mine, causing considerable damage, for which this action was brought.

The Court of Exchequer, when the special case stating the facts to which I have referred, was argued, was of opinion that the plaintiff had established no cause of action. The Court of Exchequer Chamber, before which an appeal from this judgment was argued, was of a contrary opinion, and the judges there unanimously arrived at the conclusion that there was a cause of action, and the plaintiff was entitled to damages.

My lords, the principles on which this case must be determined, appear to me to be extremely simple. The defendants treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might, in the ordinary course of the enjoyment of land, be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving or by interposing some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature.

As an illustration of that principle, I may refer to a case which was cited in the argument before your lordships—the case of *Smith v. Kenrick*, in the Court of Common Pleas (7 C. B. 515).

On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land—and if, in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing, they were doing at their own peril; and if, in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the plaintiff and injuring the plaintiff, then for the consequence of that, in my opinion, the defendants would be liable. As the case of *Smith v. Kenrick* is an illustration of the first principle to which I have referred, so also the second principle to which I have referred is well illus-

trated by another case in the same court, the case of *Baird v. Williamson*, 15 C. B. (N. S.) 376, which was also cited in the argument at the bar.

My lords, these simple principles, if they are well founded, as it appears to me they are, really dispose of this case.

The same result is arrived at on the principles referred to by Mr. Justice BLACKBURN in his judgment, in the Court of Exchequer Chamber, where he states the opinion of that court as to the law in these words: "We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule as above stated seems, on principle, just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stench."

My lords, in that opinion I must say I entirely concur.

Therefore, I have to move your lordships that the judgment of the Court of Exchequer Chamber be affirmed, and that the present appeal be dismissed with costs.

LORD CREANWORTH:

My lords, I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Mr. Justice BLACKBURN in delivering the opinion of the Exchequer Chamber. If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.

In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of *Lambert v. Bessey*, reported by Sir THOMAS RAYMOND (Sir T. Raym. 421). And the doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non laedat alienum*. This is the principle of law applicable to cases like the present; and I do not discover in the authorities which were cited anything conflicting with it.

The doctrine appears to me to be well illustrated by the two modern cases, in the Court of Common Pleas, referred to by my noble and learned friend. I allude to the two cases of *Smith v. Kenrick* and *Baird v. Williamson*. In the former, the owner of a coal mine on the higher level worked out the whole of his coal, leaving no barrier between his mine and the mine on the lower level, so that the water percolating through the upper mine flowed into the lower mine, and obstructed the owner of it in getting his coal. It was held that the owner of the lower mine had no ground of complaint. The defendant, the owner of the upper mine, had a right to remove all his coal. The damage sustained by the plaintiff

was occasioned by the natural flow or percolation of water from the upper strata. There was no obligation on the defendant to protect the plaintiff against this. It was his business to erect or leave a sufficient barrier to keep out the water, or to adopt proper means for so conducting the water as that it should not impede him in his workings. The water, in that case, was only left by the defendant to flow in its natural course.

But in the latter case of *Baird v. Williamson*, the defendant, the owner of the upper mine, did not merely suffer the water to flow through his mine without leaving a barrier between it and the mine below, but in order to work his own mine beneficially he pumped up quantities of water which passed into the plaintiff's mine, in addition to that which would have naturally reached it, and so occasioned him damage. Though this was done without negligence, and in the due working of his own mine, yet he was held to be responsible for the damage so occasioned. It was in consequence of his act, whether skilfully or unskilfully performed, that the plaintiff had been damaged, and he was therefore held liable for the consequences. The damage in the former case may be treated as having arisen from the act of God; in the latter, from the act of the defendant.

Applying the principle of these decisions to the case now before the house, I come without hesitation to the conclusion that the judgment of the Exchequer Chamber was right. The plaintiff had a right to work his coal through the lands of Mr. Whitehead, and up to the old workings. If water naturally rising in the defendants' land (we may treat the land as the land of the defendants for the purpose of this case) had by percolation found its way down to the plaintiff's mine through the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint. Even if all the old workings had been made by the plaintiff, he would have done no more than he was entitled to do; for, according to the principle acted on in *Smith v. Kenrick*, the person working the mine, under the close in which the reservoir was made, had a right to win and carry away all the coal without leaving any wall or barrier against Whitehead's land. But that is not the real state of the case. The defendants,

in order to effect an object of their own, brought on to their land, or on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff, and for that damage, however skillfully and carefully the accumulation was made, the defendants, according to the principles and authorities to which I have adverted, were certainly responsible.

I concur, therefore, with my noble and learned friend in thinking that the judgment below must be affirmed, and that there must be judgment for the defendant in error.

Judgment of the Court of Exchequer Chamber affirmed.
Lords' Journals, 17th July, 1868.

Attorneys for plaintiffs in error: N. C. & C. MILNE.

Attorneys for defendant in error: NORRIS & ALLEN.

SMITH v. KENRICK.

(7 Common Bench, 515. Common Pleas, 1849.)

- ¹ **Lower mine must protect itself.** It is the business of the owner of the lower mine to protect himself by barriers or otherwise; the duty of leaving barriers is not incumbent upon the owner of the upper mine.
- ² **Facts of the case.** Plaintiff was possessed of a colliery and the defendant of a colliery upon a higher level than that of plaintiff. A previous occupant of defendant's works with whom defendant was in no wise connected, had worked through and into defendant's barrier of coal so as to leave them exposed to the accumulation of water, upon the removal of certain coal standing in the defendant's mine; defendant removed this coal in his own mine, whereupon the water escaped into the lower mine through the wrongful act of the previous occupant of defendant's mine: *Held*, that defendant was not responsible for the injury resulting.
- ³ **Upper mine may be worked to boundary.** The owner of the mine on the higher level has a right to work the whole of his mine in the usual and proper manner so as to get out all the coal; and he is not liable to the owner of the lower mine for the flow of water from works so conducted.

This was an action on the case, in which The New British Iron Company, who are incorporated by act of Parliament,

¹ *Bannon v. Mitchell*, 2 M. R. 108.

² *Mexborough v. Bower*, 2 M. R. 92.

³ *Baird v. Williamson*, 4 M. R. 368.

7 & 8 Vict. c. xxx, and sue by their secretary and registered public officer, were the real plaintiffs, to recover damages against the defendant for *wrongfully omitting to prevent water from flowing* through his mine into the mine of the company, and also for *wrongfully causing water to flow* from his mine into the mine of the company.

The first count of the declaration stated that, on the 1st of January, 1840, there were, and thence during all the time in that count mentioned, there had been, and still were, two collieries with the appurtenances, respectively, situate underground and adjoining one another, at the parish of Ruabon, in the county of Denbigh; one of the said collieries being a colliery called the Plas Bennion colliery, and the other of the said collieries being a colliery called the Avon Eitha colliery; and the said colliery called the Avon Eitha colliery, being a colliery situate on a higher level than the said colliery called Plas Bennion, and both the collieries being collieries which during all that time contained mines of coal and other minerals, and the said colliery called the Plas Bennion colliery being a colliery which during all that time contained divers and very many chambers, which had been theretofore formed underground in the said colliery called Plas Bennion by excavations made therein for the purpose of extracting coal and other minerals from the said mines therein, and divers and very many of the said chambers in the said colliery called Plas Bennion being, during all that time, bounded at the eastern extremity of the said colliery called Plas Bennion by part of a vein or seam of coal of and belonging to, and parcel of, and forming and being the eastern extremity of the said colliery called Plas Bennion, and the said part of the said vein or seam of coal so forming and being the eastern extremity of the said colliery called Plas Bennion, being a part of the said colliery called Plas Bennion which during all that time separated the said chambers so formed underground in the said colliery called Plas Bennion from, and formed a wall or barrier between them and certain other chambers which during all that time were in the said colliery called Avon Eitha, the last mentioned chambers so being in the said colliery called Avon Eitha, being chambers which theretofore had been formed in the said colliery called Avon Eitha by

excavations theretofore made therein for the purpose of extracting coal from the veins or seams of coal in the said colliery called Avon Eitha. That on the day and year last aforesaid, the said company became and were, and thence always before and up to and at the times of the committing of the grievances and of the happening of the damage thereafter in that count mentioned, and at and during all the times thereafter in that count mentioned, continued to be and were and still remained possessed of the said colliery called Plas Bennion. That while the said company were so possessed of the said colliery called Plas Bennion, to wit, on the 1st of January, 1840, certain persons, to wit, Evan Jones and divers and very many other persons were, and thence up to a certain other day, to wit, the 2d of December, 1844, continued to be, and were possessed of the said colliery called Avon Eitha. That while the said Evan Jones and the said other persons were so possessed of the said colliery called Avon Eitha, and while the said company were so possessed of the said colliery called Plas Bennion, to wit, on the 1st of January, 1844, and on divers and very many other days and times between that day and the time when the said Evan Jones and the said other persons ceased to be possessed of the said colliery called Avon Eitha, the said Evan Jones and the said other persons so possessed of the said colliery called Avon Eitha, with force and arms, and against the peace of our lady the Queen, unlawfully and injuriously broke and entered the said colliery called Plas Bennion, and made divers, to wit, three large holes, called thyrlings, in the said vein or seam of coal so being part of the said colliery called Plas Bennion, and forming the eastern extremity thereof, and also extracted and detached from the said seam or vein of coal so forming the eastern extremity of the said colliery called Plas Bennion, divers and very many large quantities of the coal thereof, and whereof the same consisted. That, after the making of the said holes, to wit, on the day and year last aforesaid, the said Evan Jones and the said other persons ceased to be possessed of the said colliery called Avon Eitha; and thereupon, afterward, to wit, on the day and year last aforesaid, the defendant became, and thence always before and up to and at the time of the committing of the grievances and of the happening of the

damage thereafter in that count mentioned, and at all the times and during all the time thereafter in that count mentioned, continued to be and was, and still remained, possessed of the said colliery called Avon Eitha. That, at the said time when the defendant so became possessed of the said colliery called Avon Eitha, and thence continually up to and at all the times and during all the time thereafter in that count mentioned, the said quantities of coal so extracted and detached from the said part of the said vein or seam of coal, so forming the eastern extremity of the said colliery called Plas Bennion, remained and were so extracted and detached therefrom, and the said holes so made in the said part of the said vein or seam of coal of and belonging to the said colliery called Plas Bennion, and forming the eastern extremity thereof, remained and were so made in the said colliery called Avon Eitha, and were not in any manner stopped up or filled up. * That a long time before and at the respective times of the said company, and the said Evan Jones and the said other persons, and of the defendant's becoming respectively possessed of the said collieries respectively as aforesaid, and thence up to and at the time of the committing of the grievances and of the happening of the damage thereafter in that count mentioned, and at the times and during all the time thereafter in that count mentioned, there was a large subterranean body or accumulation of water, of great depth and extent, lying and being on a higher level than the said collieries respectively called Plas Bennion and Avon Eitha, and being nearer to the said colliery called Avon Eitha than to the said colliery called Plas Bennion—the said colliery called Avon Eitha lying between the said body or accumulation of water and the said colliery called Plas Bennion—the said body or accumulation of water having at all times before and up to and at the time when a passage for the same into the said colliery called Avon Eitha was opened and formed in the manner thereafter in that count mentioned, being separated from and kept out of the said colliery called Avon Eitha by part of a vein or seam of coal, and by other substances interposed and lying and being between the said colliery called Avon Eitha and the said body or accumulation of water. That, at all times after the committing of the said acts by the said Evan Jones and the said other persons

so possessed of the said colliery called Avon Eitha, and before and at the time when the defendant cut and removed, in the manner thereafter in that count mentioned, from the said part of the said vein or seam of coal and other substances so separating the said colliery called Avon Eitha from, and forming a barrier between it and the said body or accumulation of water, and thence continually up to and at the time when a passage for the said water into the said colliery called Avon Eitha was opened and formed, in the manner thereafter in that count mentioned, the said colliery called Plas Bennion, and the chambers thereof, were, by reason of the said acts so committed by the said Evan Jones and the said other persons, and by reason of the position of the said body or accumulation of water in relation to the said collieries called Avon Eitha and Plas Bennion respectively, and by reason of the position of the said colliery called Avon Eitha in relation to the said colliery called Plas Bennion, liable and likely to be inundated, in the event of a passage for the said body or accumulation of water being opened or formed in the said part of the said vein or seam of coal and the said other substances so separating the same from the said colliery called Avon Eitha, by the said water descending and pouring down through such passage into the said colliery called Avon Eitha, and thence flowing through the said holes, and penetrating and permeating through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, into the said colliery called Plas Bennion, and the said chambers thereof. That but for the said holes, and but for the detaching and extracting of the said coals from the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, as it was before the making of the said holes, and before the detaching and extracting of the said coal therefrom, would at all times after a passage was opened and formed for the said water into the said colliery called Avon Eitha, in the manner thereafter in that count mentioned, have formed a barrier sufficient to prevent, and which would have prevented, the water—which was thereafter in that

count mentioned to have run and flowed into the said colliery called Avon Eitha, and thence to have flowed through the said holes, and to have penetrated and permeated through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery, called Plas Bennion, into the said colliery called Plas Bennion, and the chambers thereof—from so flowing through the said holes, and from so penetrating and permeating through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Avon Eitha; that, of all the premises the defendant—before and at the times when the defendant cut and removed, in the manner thereafter in that count mentioned, the coal and other substances from the said part of the said vein or seam of coal so separating the said colliery called Avon Eitha from, and forming a barrier between it and the said body or accumulation of water, and at all the times, and during all the time, thereafter in that count mentioned, and always—had notice and knowledge. That, by reason of the premises thereinbefore in that count mentioned, the defendant of right ought to have refrained from committing the grievances thereafter in that count mentioned. Yet, that the defendant, well knowing the premises, but, contriving and intending to injure the said company, afterward, and after the said holes had been so made in the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, and after the said coals had been so extracted and detached therefrom, and while the defendant was possessed of the said colliery called Avon Eitha, and while the said company were possessed of the said colliery called Plas Bennion, and before the commencement of this suit, to wit, on the 1st of January, 1845, and on divers and very many other days and times between that day and the commencement of this suit, while the said holes remained and were in the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, and after the said coal had been so detached and extracted therefrom, and while the defendant was possessed of the said colliery called Avon Eitha, and while the said company was possessed of the said colliery called Plas Bennion, wrongfully, unlawfully, improperly and injuriously cut and removed away

from the said part of the said vein or seam of coal and the said other substances so separating the said body or accumulation of water from the said colliery called Avon Eitha, and forming a barrier between the same and the said body or accumulation of water, divers and very many large quantities, to wit, 100,000 tons, of the said part of the said vein or seam of coal and other substances so separating the said colliery called Avon Eitha from, and forming a barrier between it and the said body or accumulation of water; whereby, afterward, to wit, on the day and year last aforesaid, a passage for the said water was opened and formed, and thence continually for a long space of time, to wit, thence to the time of this suit, continued open, through the said part of the said vein or seam of coal and other substances so separating the said colliery called Avon Eitha from, and forming a barrier between it and the said body or accumulation of water, into the said colliery called Avon Eitha. That the defendant, well knowing the premises, and contriving and intending to injure the said company, at the said time of the cutting and removing of the said coal and other substances from the said part of the said vein or seam of coal and other substances so separating the colliery called Avon Eitha from, and forming a barrier between it and the said body or accumulation of water, and thence continually up to and at the time of the said passage for the said water being opened and formed through the said last mentioned vein or seam of coal and other substances, and thence continually up to and at the several times thereafter in that count mentioned, wrongfully, carelessly, unlawfully, negligently, injuriously and improperly worked, managed and kept the said colliery called Avon Eitha, and wrongfully, unlawfully, and improperly, carelessly and injuriously neglected to take reasonable and proper means to prevent, and wrongfully and improperly, unlawfully and injuriously neglected to prevent, and did not prevent, the said water which was thereafter in that count mentioned to have flowed from the said colliery called Avon Eitha into the said colliery called Plas Bennion, through the said holes, and which was thereafter in that count mentioned to have penetrated and permeated through the said part of the said vein or seam of coal so forming the eastern boundary of the said colliery called Plas Bennion, in the

manner thereafter in that count mentioned, from so flowing through the said holes, and so penetrating and permeating through the said part of the said vein or seam of coal so forming the eastern boundary of the said colliery called Plas Bennion, as thereinbefore mentioned. That, by means of the several premises, afterward, to wit, on the day and year last aforesaid, and on divers and very many other days between that day and the commencement of this suit, divers large quantities of the said body or accumulation of water ran and flowed into the said colliery called Avon Eitha, through the said passage so opened and formed in the said part of the said vein or seam of coal and other substances which so, before the forming and opening of the said passage, separated the said colliery called Avon Eitha from, and formed a barrier between it and the said body or accumulation of water; and divers large quantities of the said water which so flowed through the said passage into the said colliery called Avon Eitha, ran and flowed from the said colliery called Avon Eitha into the said colliery called Plas Bennion, through the said holes so being in the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion; and divers other large quantities of the said water which so flowed through the said passage into the said colliery called Avon Eitha, penetrated and permeated through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, into the said colliery called Plas Bennion, and the said chambers therein; by reason and means whereof * * the said colliery called Plas Bennion, and the chambers thereof, were, afterward, to wit, on the days and times last aforesaid, inundated and filled by and with the said water which so flowed through the said holes, and penetrated and permeated through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion; and by reason thereof the said company, afterward, and before the commencement of this suit, to wit, on the several days and times last aforesaid, and thence always up to the time of the commencement of this suit, were hindered and prevented from digging and obtaining coal from the mines of coal then being in and parcel of the said colliery called Plas Bennion,

and from enjoying and working the said colliery called Plas Bennion, in so extensive, complete, beneficial and convenient a manner as they otherwise might and would have done; and, by reason of the premises, afterward, and before the commencement of this suit, to wit, on the 1st of January, 1845, and on divers and very many other days and times after the said colliery called Plas Bennion, and the chambers thereof, had been so inundated and filled with water, and before the commencement of this suit, to wit, at the several days and times last aforesaid, the said company were forced and obliged to, and at those times did, pump from the said colliery called Plas Bennion, and the said chambers thereof, the said water, wherewith the same had been so inundated, and, in so doing, were put to great expense, to wit, to the amount of £2,000.

The second count was similar to the first, as far as the asterisk in p. 145; it then proceeded to state: That, by reason of the committing of the said acts by the said Evan Jones, and the said other persons so possessed of the said colliery called Avon Eitha in that count mentioned, the said colliery called Plas Bennion in that count mentioned, and the said chambers so formed therein, were at all times after the committing of the said acts by the said Evan Jones and the said other persons, rendered liable to be, and had at all times after the committing of the said acts been liable to be, and still by reason of the said acts were liable to be, inundated, on occasions of water being introduced into or being in the said colliery called Avon Eitha in that count mentioned, by such water flowing through the said holes, and penetrating and permeating through the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned. That but for the said holes, and but for the detaching and extracting of the said coals from the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, as it was before the making of the holes, and before the detaching and extracting of the said coal therefrom, would, at the times when water was introduced into the said colliery called Avon

Eitha, in that count mentioned, as thereafter in that count mentioned, have formed a barrier sufficient to prevent, and which would have prevented, the water which was thereafter mentioned to have been introduced into the said colliery called Avon Eitha, in that count mentioned, and thence to have flowed through the said holes, and to have penetrated and permeated through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, in that count mentioned, into the said colliery called Plas Bennion in that count mentioned, from so flowing through the said holes, and penetrating and permeating through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned.

That, by reason of the defendant's possession of the said colliery called Avon Eitha in that count mentioned, and by reason of the position thereof in relation to the said colliery called Plas Bennion in that count mentioned, and by reason of the matters and things in that count mentioned, the defendant, during all the time while he was possessed of the said colliery called Avon Eitha in that count mentioned, of right, ought to have prevented, and still of right ought to prevent, the water from time to time introduced by the defendant into, and caused by the defendant to be in the said colliery called Avon Eitha in that count mentioned, and the said chambers thereof, during the defendant's possession thereof, from flowing through the said holes into the said colliery called Plas Bennion in that count mentioned, and the said chambers thereof, and from penetrating and permeating through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, and the chambers thereof. That, of all the premises, the defendant always had notice and knowledge. Yet that the defendant, well knowing the premises, but contriving and intending to injure the said company, after the said holes had been so made in the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, and after the said coal had been so extracted

and detached from the said part of the said vein or seam of coal forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, and while the said company were possessed of the said colliery called Plas Bennion in that count mentioned, to wit, always from the said time of the defendant's so becoming possessed of the said colliery called Avon Eitha, in that count mentioned, to the time of the commencement of this suit, wrongfully, maliciously, unlawfully, and injuriously introduced into, and caused to be in, the said colliery called Avon Eitha in that count mentioned, and the chambers thereof, divers and very many large quantities of water; and the defendant further contriving, and wrongfully and maliciously intending to injure the said company, afterward, and after the said holes had been so made and after the said coal had been so extracted and detached from the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, and while the defendant was so possessed of the said colliery called Avon Eitha in that count mentioned, and while the said company were so possessed of the said colliery called Plas Bennion, in that count mentioned, and while the said holes so remained and were continued by the defendant, and before the same had been stopped up, and after the said water had been so introduced into, and while it was in the said colliery called Avon Eitha, in that count mentioned, and the chambers so formed in the said colliery called Avon Eitha, in that count mentioned, to wit, on the said several days and times when the said water was so introduced into, and while it was in, the same chambers, and from those times respectively to the time of the commencement of this suit, wrongfully, unlawfully, maliciously and injuriously omitted to prevent the said water so introduced into and being in the said colliery called Avon Eitha, in that count mentioned, and the said chambers so formed therein, from flowing from the said colliery called Avon Eitha, in that count mentioned, and the chambers thereof, through the said holes, into the said colliery called Plas Bennion, in that count mentioned, and the chambers thereof, and from penetrating and permeating through the said part of the said vein or seam of

coal, so forming the eastern extremity of the said colliery called Plas Bennion, in that count mentioned, into the said colliery called Plas Bennion, in that count mentioned, and the chambers thereof; and that by means, and in consequence of the premises in that count mentioned, to wit, on the several days and times when the said water had been so introduced into, and was in, the said colliery called Avon Eitha, in that count mentioned, and the said chambers so formed therein, and on divers and very many other days and times, after those days and times respectively, and before the commencement of this suit, divers large quantities of the water so introduced into, and being in, the said colliery called Avon Eitha, in that count mentioned, and the said chambers so being therein, flowed from the said colliery called Avon Eitha, in that count mentioned, and the said chambers therein, through the said holes so being in the said vein or seam of coal, so forming the eastern extremity of the said colliery called Plas Bennion, in that count mentioned, into the said colliery called Plas Bennion, in that count mentioned, and into the said chambers so made in the said colliery called Plas Bennion, in that count mentioned; and divers other large quantities of the said water so introduced into and being in the said colliery called Avon Eitha in that count mentioned, and the chambers thereof, penetrated and permeated through the said part of the same vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, into the said colliery called Plas Bennion in that count mentioned, and the chambers so formed therein; and that the defendant, further contriving, and wrongfully and maliciously intending to injure the said company, afterward and after the said holes had been so made as aforesaid, and after the said coal had been so extracted and detached from the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, and while the defendant was so possessed of the said colliery called Avon Eitha in that count mentioned, and while the said company was possessed of the said colliery called Plas Bennion in that count mentioned, and before the commencement of this suit, to wit, on the several days and times last aforesaid, wrongfully, unlawfully, maliciously and

injuriously caused and procured divers other very large quantities of the said water so introduced into, and being in, the said colliery called Avon Eitha in that count mentioned, and the chambers thereof as aforesaid, to flow, and the said last mentioned quantities of the said water, at those times were, on those days and times, thereby made to flow, and, on these days and times, did flow, through the said holes into the said colliery called Plas Bennion in that count mentioned, and the said chambers thereof; and wrongfully, unlawfully, maliciously and injuriously caused and procured divers other large quantities of the said water so introduced into and being in the said colliery called Avon Eitha in that count mentioned, and the said chambers thereof, to penetrate and permeate, and the said last mentioned quantities of water, at the said last mentioned days and times, did penetrate and permeate, through the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, into the said colliery called Plas Bennion in that count mentioned, and the said chambers so formed therein. That by means thereof, etc., as in the first count from the double asterisk in p. 149, to the end.

The defendant pleaded, first, not guilty to the whole declaration.

Secondly, thirdly, fourthly, fifthly, sixthly, seventhly and eighthly, pleas respectively putting in issue the several allegations in the first count.

Ninthly, that the said chambers in the said colliery called Plas Bennion, in the second count mentioned, were not bounded at the eastern extremity of the said colliery by part of a vein or seam of coal of and belonging to, and parcel of, and forming and being the eastern extremity of the said last mentioned colliery called Plas Bennion, nor was the said part of the said vein or seam of coal a part of the said last mentioned colliery called Plas Bennion, which separated the said chamber so formed under ground in the said last mentioned colliery called Plas Bennion from, or formed a barrier between them and the said other chambers which were in the said colliery called Avon Eitha, in manner and form as in the said second count alleged, etc.

Tenthly, that while the said Evan Jones and the said other

persons were so possessed of the said last mentioned colliery called Avon Eitha, and while the said company were so possessed of the said last mentioned colliery called Plas Bennion, the said Evan Jones and the said other persons so possessed of the said last mentioned colliery called Avon Eitha, did not break or enter the said last mentioned colliery called Plas Bennion, or make therein the said holes called thyrlings, or any of them, in the said vein or seam of coal so being part of the said last mentioned colliery called Plas Bennion, and forming the eastern extremity thereof, nor extract or detach from the said vein or seam of coal so being a part, and forming the eastern extremity of the said colliery called Plas Bennion, and forming the said wall or barrier, the said large quantities, or any part, of the coal thereof, and whereof the same consisted in manner and form as in the said second count is alleged, etc.

Eleventhly, except as to so much of the second count as charged the defendant with having wrongfully, unlawfully, maliciously and injuriously caused and procured the said quantities of water so introduced into and being in the said colliery called Avon Eitha in the said second count mentioned, and the chambers thereof, to flow, and with having thereby made the same to flow, through the said holes into the said colliery called Plas Bennion in the same count mentioned, and the chambers thereof, and with having wrongfully, maliciously and injuriously caused and procured the said other quantities of the said water so introduced into and being in the last mentioned colliery called Avon Eitha, and the said chambers thereof, to penetrate and permeate through the said vein or seam of coal into the last mentioned colliery called Plas Bennion, and the said chambers so formed therein, as in the second count alleged; that by reason of the committing of the said acts by the said Evan Jones and the said other persons so possessed of the said last mentioned colliery called Avon Eitha, the said colliery called Plas Bennion in the second count mentioned, and the said chambers so formed therein, were not, after the committing of the said acts by the said Evan Jones and the said other persons, rendered liable to be, nor were they by reason of the said acts liable to be, inundated on occasions of water being introduced into or

being in the said colliery called Avon Eitha in the said second count mentioned, by such water flowing through the said holes and penetrating and permeating through the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in the said second count mentioned, in manner and form as in the said second count was alleged, etc.

Twelfthly, except as in the introductory part of the eleventh plea, that but for the said holes, and but for the detaching and extracting of the said coal from the said part of the said vein or seam of coal so forming the eastern extremity of the said last mentioned colliery called Plas Bennion, in the said second count mentioned, the said part of the said vein or seam of coal so forming the eastern extremity of the said last mentioned colliery, as it was before the making of the said holes, and before the detaching and extracting of the said coal therefrom, would not, at the times when water was introduced into the said colliery called Avon Eitha, in the said second count mentioned, as therein mentioned, or at any or either of such times, have formed a barrier sufficient to prevent, nor would the same have prevented, the water, or any part thereof in the said second count mentioned, to have been introduced into the said last mentioned colliery called Avon Eitha, and thence to have flowed through the said holes, and to have penetrated and permeated through the said part of the said vein or seam of coal so forming the eastern extremity of the said last mentioned colliery called Plas Bennion, into the same colliery, from so flowing through the said holes, or penetrating or permeating through the said part of the said vein or seam of coal so forming the eastern extremity of the same colliery, in manner and form as therein alleged, etc.

Thirteenthly, except as in the introductory part of the eleventh plea, that the defendant, by reason of his possession of the said colliery called Avon Eitha, in the said second count mentioned, and by reason of the position thereof in relation to the said colliery called Plas Bennion, in the same count mentioned, and by reason of the matters and things in that count mentioned, or by reason of any or either of the said matters, ought not of right, during all the time, or any of the time, while he was possessed of the said last mentioned coll-

iery called Avon Eitha, to have prevented the water from time to time introduced by him, the defendant, into, or caused by him to be in, the said last mentioned colliery called Avon Eitha; or the said chambers thereof, during his, the defendant's, possession thereof, from flowing through the said holes, into the said last mentioned colliery called Plas Benniôn, or the said chambers thereof, or from penetrating or permeating through the said part of the said vein or seam of coal so forming the eastern extremity of the said last mentioned colliery called Plas Bennion, or the chambers thereof, in manner and form as in the said second count alleged, etc.

Fourteenthly, that the defendant had not notice or knowledge of all or any of the premises in the said second count in that behalf mentioned, in manner and form as therein alleged, etc.

Fifteenthly (to both counts), that, before the commencement of this suit, to wit, on the 4th of June, 1845, the plaintiff, being then the secretary of the said New British Iron Company, the said company did, in the name of the now plaintiff, as such secretary, and for and on behalf of the said company, bring and commence a former action on the case against the now defendant, in this court here, before, etc.; and the defendant having duly appeared in this court to the said action, the said company, in the name of the plaintiff as such secretary, as aforesaid, and on behalf of the said company, afterward, on the 24th of October, 1845, duly declared in the said former action in this court against the now defendant, for the committing of so much of the same grievances mentioned and complained of by the plaintiff, as such secretary as aforesaid, in his declaration in this present suit, and laid the damages of the said company in the said declaration in the said former action, by reason of the said grievances therein mentioned, at £5,000; that, after the said company, in the name of the plaintiff, declared in the said former action as aforesaid, that is to say, on the 30th of January, 1846, the now defendant duly pleaded in this court in and to the said former action (payment into court of £70); that the plaintiff, as such secretary as aforesaid, took the said £70 out of court, etc.; and that the defendant afterward, to wit, on, etc., paid to the said company, £22 17s., for costs, etc.

The plaintiff joined issue on the first fourteen pleas, and replied to the last, so far as the same related to the second count, that, by reason of anything in the said last plea alleged, he ought not to be barred from having or maintaining his aforesaid action thereof, for and on behalf of the said company, against the defendant, in respect of the grievances in the second count mentioned, because he said that the plaintiff, for and on behalf of the said company, issued his writ in this suit, so far as it related to the grievances in the second count mentioned, and declared thereupon, not for the grievances for the committing of which the said company, in the name of the plaintiff, as such secretary as aforesaid, and on behalf of the said company, declared against the defendant in the said former action—and in satisfaction and discharge of the damages sustained by the said company in respect of which last mentioned grievances up to the time when the said plea in the said former action was pleaded, he, the plaintiff, so accepted and took out of court the said sum of £70—but for that the defendant, contriving and intending to injure the company, after the said holes in the second count mentioned had been so made in the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, in the second count mentioned, and after the said coal had been so extracted and detached from the said part of the said vein or seam of coal in the second count mentioned, forming the eastern extremity of the said colliery called Plas Bennion, in the second count mentioned, and while the defendant was possessed of the said colliery called Avon Eitha, in the said second count mentioned, and while the said company were possessed of the said colliery called Plas Bennion, in the second count mentioned, and after the pleading of the said plea in the said former action, and at the said time when, etc., in the second count in that behalf mentioned, to wit, always from the said time of the defendant's so becoming possessed of the said colliery called Avon Eitha, in the second count mentioned, to the time of the commencement of this suit, wrongfully, maliciously, unlawfully and injuriously *introduced into, and caused to be introduced in,* the said colliery called Avon Eitha, in the second count mentioned, and the chambers thereof, divers and very many large quantities of water.

That the defendant further contriving and wrongfully and maliciously intending to injure the said company, afterward and after the said holes in the second count mentioned had been so made, and after the said coal had been so extracted and detached from the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, in the second count mentioned, and while the defendant was so possessed of the said colliery called Avon Eitha, in the second count mentioned, and while the said company were so possessed of the said colliery called Plas Bennion, in the second count mentioned, and while the said last mentioned holes so remained and were continued by the defendant, and before the same had been stopped up, and after the said water had been so introduced into, and while it was in the said colliery called Avon Eitha, in the second count mentioned, and the chambers so formed in the said colliery called Avon Eitha, in the second count mentioned, and after the pleading of the said plea in the said former action, and at the said times when, etc., in the second count in that behalf mentioned, to wit, on the said several days and times when the said water was so introduced into, and while it was in the same chambers as thereinbefore mentioned, and from those times respectively to the time of the commencement of this suit, wrongfully, unlawfully, maliciously and injuriously *omitted to prevent* the said water so introduced and being in the said colliery called Avon Eitha, in the second count mentioned, and the said chambers so formed therein, from flowing from the said colliery called Avon Eitha, in the second count mentioned, and the chambers thereof, through the said holes into the said colliery called Plas Bennion, in the second count mentioned, and the chambers thereof, and from penetrating and permeating through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, in the second count mentioned, into the said colliery called Plas Bennion, in the second count mentioned, and the chambers thereof.

That, by means and in consequence of the premises thereinbefore, and in the second count mentioned, after the pleading of the said plea in the said former action, and at the said times when, etc., in the second count in that behalf men-

tioned, to wit, on the several days and times when the said water had been so introduced into and was in the said colliery called Avon Eitha, in the second count mentioned, and the said chambers so formed therein, and on divers and very many other days and times after those days and times respectively, and before the commencement of this suit, divers large quantities of the water, so introduced into and being in the said colliery called Avon Eitha, in the second count mentioned, and the said chambers so being therein, flowed from the said colliery called Avon Eitha, in the second count mentioned, and the said chambers therein, through the said holes so being in the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, in the second count mentioned, into the said colliery called Plas Bennion, in the second count mentioned, and into the chambers so made in the said colliery called Plas Bennion, in the second count mentioned; and divers other large quantities of the said water so introduced into and being in the said colliery called Avon Eitha, in the second count mentioned, and the chambers thereof, penetrated and permeated through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, in the second count mentioned, into the said colliery called Plas Bennion, in the second count mentioned, and the chambers so formed therein.

That the defendant, further contriving, and wickedly and maliciously intending to injure the said company, afterward and after the said holes had been so made as aforesaid, and in the second count mentioned, and after the said coal had been so extracted and detached from the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, in the second count mentioned, and while the defendant was so possessed of the said colliery called Avon Eitha, in the second count mentioned, and while the said company were possessed of the said colliery called Plas Bennion, in the second count mentioned, and before the commencement of this suit, and after the pleading of the said plea in the said former action, and at the said times, when, etc., in the second count in that behalf mentioned, to wit, on the several days and times last aforesaid, wrongfully,

unlawfully, maliciously, and injuriously *caused and procured* divers other large quantities of the said water, so introduced into and being in the said colliery called Avon Eitha, in the second count mentioned, and the chambers thereof as aforesaid to flow, and the said last mentioned quantities of the said water at those times were in those days and times thereby made to flow and on those days and times did flow, through the said holes, into the said colliery called Plas Bennion, in the second count mentioned, and the said chambers thereof, and wrongfully, unlawfully, maliciously and injuriously *caused and procured* divers other large quantities of the said water so introduced into and being in the said colliery called Avon Eitha, in the second count mentioned, and the said chambers thereof, to penetrate and permeate, and the said last mentioned quantities of water, at the said last mentioned days and times, did penetrate and permeate, through the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, in the second count mentioned, into the said colliery called Plas Bennion, in the second count mentioned, and the said chambers so formed therein. That, by means thereof, the said colliery called Plas Bennion, in the second count mentioned, and the chambers thereof, afterward, and before the commencement of this suit, and after the pleading of the said plea in the said former action, and at the said times when, etc., in the second count in that behalf mentioned, to wit, on the day and year last aforesaid, were inundated and filled by the said water which by means of the premises so flowed through the said holes, and penetrated and permeated through the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, in the second count mentioned and into the said chambers thereof.

That, by reason of the premises, the said company afterward, and before the commencement of this suit, and after the pleading of the said plea in the said former action, and at the said times when, etc., in the second count mentioned, to wit, on the several days and times last aforesaid, and thence always up to the time of the commencement of this suit, were hindered and prevented from digging and obtaining coal from the mines of coal then being in and parcel of the said colliery called Plas Bennion, in the second count mentioned, and from

enjoying and working the said colliery called Plas Bennion, in the second count mentioned, in so extensive, complete, beneficial, and convenient a manner as they otherwise might and would have done; and that, by reason of the premises, afterward, and before the commencement of this suit, and after the pleading of the said plea "in the second count mentioned," and at the said times when, etc., in the second count in that behalf mentioned, to wit, on the 1st of January, 1846, and on divers and very many other days and times after the said colliery called Plas Bennion, in the second count mentioned, and the chambers thereof, had been so inundated, and before the commencement of this suit, the said company were forced and obliged to, and at those times did, pump from the said colliery called Plas Bennion, in the second count mentioned, and the said chambers thereof, the said water wherewith the same had been so inundated and filled and in so doing were put to great expense, to wit, to the amount of £1,000; and which said grievances above newly assigned in respect of the grievances in the second count mentioned, were other and different grievances from the grievances in the last plea mentioned, for the committing of which the said company, in the name of the plaintiff, as such secretary as aforesaid, and on behalf of the said company, declared against the defendant in the said former action, and in satisfaction and discharge of the damage sustained by the said company in respect of which last mentioned grievances up to the time when the said plea in the said former action was pleaded, he, the plaintiff, so excepted and took out of court the said sum of £70, and this the plaintiff was ready to verify; wherefore, inasmuch as the defendant had not answered the grievances above newly assigned in respect of the grievances in the second count mentioned, the plaintiff, as such secretary as aforesaid, for and on behalf of the said company, prayed judgment, and the damages by the said company sustained on occasion thereof, to be adjudged to him for and on behalf of the said company.

The defendant pleaded not guilty to the new assignment.

The cause came on for trial at the Chester summer assizes in the year 1846, when, by order of *nisi prius*, a verdict was found for the plaintiff, "subject to the award and determina-

tion of a special case, to be stated for the opinion of this court by a barrister, to whom, after the court should have given judgment on the special case, all matters in difference between the said parties were by the said order referred."

The pleadings in this action and the order of *nisi prius* were to form part of the special case. The plaintiffs had abandoned the first count of their declaration. In obedience to the said order of *nisi prius* the following case was submitted to the judgment of the court:

The plaintiffs for many years then last past, and up to the time of the commencing of this action, were in possession of a colliery called Plas Bennion, in the parish of Ruabon, in the county of Denbigh.

In the year 1846, and while the plaintiffs were in the possession of Plas Bennion, as aforesaid, one Evan Jones, and others, his partners, became possessed of an adjoining colliery, called the Avon Eitha colliery, in the same parish.

Evan Jones and his partners continued to be possessed of the last mentioned colliery until the month of December, 1844. At this time they quitted possession, and were succeeded by the defendant, who has remained in possession ever since.

The Avon Eitha colliery is on a higher level than the Plas Bennion colliery.

At the time when Evan Jones and his partners commenced their occupation of the Avon Eitha colliery, both that colliery and the Plas Bennion colliery had been worked to a great extent; and they each contained several chambers, made by the removal of large quantities of coal.

At the time last mentioned the colliery of Plas Bennion was bounded on the east by a vertical seam or vein of coal, the property of the plaintiffs, and part of their colliery; and this seam or vein of coal formed a barrier between the chambers in Plas Bennion and the chambers in Avon Eitha.

In the beginning of the year 1844, Evan Jones and partners made three large holes, called "thyrings," in and through the barrier above mentioned, for the purpose of giving air to the Avon Eitha colliery.

The defendant became the occupier of Avon Eitha, without any privity, either of contract or of estate, between him and his predecessors, Evan Jones and partners.

At the time when the defendant became such occupier, there was a large subterranean body of water in Avon Eitha, which communicated with, and was fed by springs in the neighborhood. This body of water was on a higher level than the chambers of Avon Eitha, and separated from them by a thick horizontal bar of coal, which was part of Avon Eitha colliery.

The chambers of Avon Eitha were on a higher level than the thyrlings above mentioned, and the thyrlings were on a higher level than the chambers of Plas Bennion.

The effect of removing the horizontal bar of coal in Avon Eitha would be, that the water above mentioned would, of itself, flow into the chambers of Avon Eitha; and that a large portion of such water would also flow on, of itself, from the chambers of Avon Eitha, through the thyrlings, into the chambers of Plas Bennion.

The defendant, during his occupation, and before the month of June, 1845, knowing that these thyrlings were then open into Plas Bennion, and that the effect of removing the horizontal bar of coal in Avon Eitha would be as above stated, nevertheless did remove the said bar of coal, for the purpose of obtaining the said coal, and so working his mine in the manner most advantageous to himself.

In consequence of the removal of this horizontal bar of coal in Avon Eitha, the water, of itself, flowed from the said subterranean body of water into the chambers of Avon Eitha. One portion of the water which had so flowed into the chambers of Avon Eitha, flowed on, of itself, through the thyrlings into the chambers of Plas Bennion. Another portion of the water which had so flowed into the chambers of Avon Eitha, and which, if not obstructed in its natural course, would have flowed down to the bottom of Avon Eitha, and below the thyrlings, was obstructed in its natural course by a dam which the defendant had placed in Avon Eitha, and near to the thyrlings, and was thereby thrown through the thyrlings into the chambers of Plas Bennion. This dam was removed before the commencement of the action *next mentioned* by some of the workmen of the Plas Bennion colliery.

The vertical seam of coal above mentioned as forming the eastern boundary of Plas Bennion, would have been sufficient

to prevent the said flow of water in Plas Bennion, if the thyrlings had not been made as aforesaid in the said seam of coal, by Evan Jones and his partners.

On the 4th of June, 1845, the plaintiff brought an action on the case against the defendant, for the injury caused to Plas Bennion by the flow of water as aforesaid.

On the 30th of January, 1846, the defendant paid £70 into court, and pleaded the payment in the usual form; and, on the 28th of March, in the same year, the plaintiffs replied, accepting the said payment in satisfaction. The record in that action was to form part of the present case.

The present action was brought on the 30th of April, 1846.

Since the commencement of the first action, and up to the time of the commencement of the present action, water has, in consequence of the removal of the said horizontal bar of coal in Avon Eitha as aforesaid, occasionally flowed of itself, in the manner already stated, from the said subterranean body of water in Avon Eitha into the chambers of Avon Eitha, and so also flowed on of itself, through the thyrlings, into the chambers of Plas Bennion, in the same manner as has been before stated; and the colliery of Plas Bennion has been thereby injured.

With respect to the sufficiency of the said vertical seam of coal, forming the eastern boundary of Plas Bennion, as a subsisting barrier to prevent the last mentioned flow of water if the thyrlings had not been made in the said barrier, and with respect to the defendant's knowledge that the thyrlings continued open, the facts were the same as before stated, with reference to the former action.

The defendant contends, first, that this action is not maintainable, as the defendant, in getting the coal from his own mine in the manner stated, has not done any act which it was his duty to refrain from; secondly, that at all events, as he has done no fresh act whatever since the commencement of the first action to cause a continuance of the flow of water into Plas Bennion, the damage now complained of might have been compensated for in that action, and therefore that the former recovery is a bar to this action.

The plaintiff contends, first, that it was the duty of the de-

fendant to refrain from cutting through the bar of coal in his own mine, under all the circumstances of the case; secondly, that, at all events, by paying money into court in the former action, the defendant has estopped himself from disputing the alleged duty; thirdly, that the recovery in the former action is no bar.

The question for the opinion of the court is, whether the present action is maintainable.

TOWNSEND (with whom were EGERTON and T. JONES), for the plaintiff.

WELSBY (with whom were J. EVANS and J. BROWN), *contra*.

CRESWELL, J., now delivered the judgment of the court.

After stating the pleadings and the principal facts, *ut ante* the learned judge proceeded as follows:

The claim of the plaintiff to compensation in this case is advanced on two grounds: first, on a supposed duty in the defendant, arising out of the act of Evan Jones in removing the plaintiff's barrier of coal, when he occupied Avon Eitha, and the subsequent occupation of the same colliery by the defendant; secondly, on a general liability said to be imposed by law upon the defendant, to be responsible for the injury done to an adjoining colliery by water casually introduced into his own, in the course of working it.

As to the first point, it is to be observed that there was no privity of any kind between Evan Jones and the defendant. The act done by Jones, of which complaint is made, was done, *not upon the premises now occupied by the defendant, but upon those of the plaintiff*. Nor does the defendant derive his title to the premises which he occupies in any way from Jones. Indeed, in the special case, it is expressly stated that there was no privity, either of estate or contract, between Jones and the defendant. In *Rosewell v. Prior*, 2 Salk. 460, the defendant, tenant for years, erected on his own premises that which was a nuisance to the plaintiff's house, and then made an under lease; and it was held that the plaintiff might sue either the defendant or his sub-lessee. Upon the same principle, if Jones had done anything in Avon Eitha colliery which made his premises, in their then state, a nuisance to

the plaintiff's colliery, the defendant, as occupier, might have been made responsible for continuing them in that state, as for upholding the nuisance. But this is a very different case. The premises occupied by the defendant are not a nuisance. The act done by Jones, to the injury of the plaintiff's mine, was *on the plaintiff's soil*, where the defendant would have no right to go, even if he wished it, for the purpose of remedying the evil that Jones had previously done. We think, therefore, that no special duty to protect the plaintiff's mine against water in the defendant's mine attached to the latter, in consequence of Jones having removed the plaintiff's barrier of coal when he occupied Avon Eitha; and of his, the defendant's, having succeeded him in such occupation.

The next ground upon which it was contended that the defendant was liable in this action, is much broader, viz., that he was, of common right, bound to prevent the water coming into his own mine, from flowing into his neighbor's. In considering this question, it is material to remember, that, in the special case, it is stated that the defendant worked out the coal which protected his own mine from the subterranean body of water, for the purpose of obtaining the coal, and so working his mine in the manner most beneficial to himself. There is nothing from which we can infer that it was an unusual or a negligent mode of proceeding, or that it was done with any design to injure his neighbor's mine. In order to establish the proposition that the defendant was bound to prevent the flow of water from his own mine into the plaintiff's, the case of *Tenant v. Goldwin*, 1 Salk. 360, was relied on. That was an action on the case, in which the plaintiff declared that he was possessed of a messuage, and in a cellar, part thereof, was wont to lay coals, etc.; that the cellar joined the defendant's messuage, and by a wall which the defendant *debut reparare*, was separated and defended from the defendant's privy, and that, for want of repairing the wall, the filth flowed through into the plaintiff's cellar. There was judgment by default, and damages were assessed upon a writ of inquiry; and then there was a motion in arrest of judgment. The declaration was held sufficient; and Lord Holt said that "it was the defendant's wall, and the defendant's filth; and he was bound of common right to keep his wall so as his filth

might not damnify his neighbour, and that it was trespass on his neighbour, as if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbour's." It was, therefore, a very different case from the present. There, there was no barrier between the plaintiff's mine and the defendant's which the latter could repair; and the flow of water into the plaintiff's mine can not be considered as a trespass. Again, the declaration in that case was held good on account of the words *debuit reparare*, which are inapplicable to the present case. But for the removal of part of the barrier of coal at the eastern side of the plaintiff's mine, the water in the defendant's mine would have done no harm; and for that removal the defendant is not responsible.

But a great many cases were referred to in the argument, to show that, independently of all questions about the removal of the barrier in the plaintiff's mine, the defendant was bound, at all events, to take care that the water which flowed into his own mine should not pass into the plaintiff's. *Tuberville v. Stamp*,¹ *Vaughan v. Menlove*,² *Sutton v. Clarke*,³ *Bayle v. Tamlyn*,⁴ *Brown v. Windsor*,⁵ *Dodd v. Holme*,⁶ and others of that class, were referred to; but, in each of those, negligence was imputed to the defendant in doing the act *upon his own premises*, which proved injurious to his neighbor; whereas here there is nothing to show that there was any negligence on the part of the defendant in working his colliery.

A case quoted from the Year Book, M. 6, E. 4, fo. 7, pl. 18, in *Lambert v. Bessey*, was relied on as an authority for the plaintiff, where negligence was not imputed to the defendant; but, upon an examination of the original report, it hardly supports that statement. It was an action for trespass to the plaintiff's close, and damaging the grass by walking, etc. The defendant justified, for that he had a close separated from it by a thorn hedge, and when he was cutting the thorns they fell, *ipso invito*, into the plaintiff's close; wherefore, he entered to take them away. After much discussion, it was held

¹ 1 Salk. 13.

² 4 Scott, 244.

³ 6 Taunt. 29.

⁴ 6 B. & C. 329.

⁵ 1 C. & J. 20.

⁶ 1 Ad. & E. 493.

that, to make the plea good, the defendant should have said, not only that the thorns fell *ipso invito*, but that he could not have cut them in any other way, and that he did all in his power to prevent them from falling upon the plaintiff's land.

Then, the case of *Harvard v. Bankes*¹ was said to be a direct authority for the plaintiff, but it is not so. The decision of the court was, simply, that a count charging the defendant with *having caused* water to flow through divers other colleries into the plaintiff's, was a count in case. It is true that the plaintiff recovered in that action; but there can be no doubt that a man may cause water to flow from his own premises into his neighbor's, so as to make himself liable to an action,—for instance, by erecting a mound, or other work, to give it that direction,—as appears to have been done by the present defendant before a former action was commenced, and in which he paid money into court as a compensation. In this case it ought not to be said that he *caused*, but that he *permitted* the water to flow into the plaintiff's mine.

Another case relied on by the plaintiff, *Firmstone v. Wheeley*,² also differs from this case in a very material particular, viz.: that the defendant there had removed from the plaintiff's mine, by a trespass, a barrier of coal which, had it existed, would have prevented the water from flowing from the defendant's mine into the plaintiff's; and, although it is hardly to be treated as a decision, the Court of Exchequer appears to have thought that, having wrongfully removed that barrier, the defendant was bound to protect the plaintiff's mine against the flow of water; and, if this action had been against Jones when he occupied Avon Eitha, it might have been urged as an authority against him. But, if Jones had been sued in trespass for removing the barrier, a second action could not have been maintained against him for the consequential damage done to the plaintiff's mine by the water flowing into it from Avon Eitha. If no such action could have been maintained against *him*, it would be singular if it could be maintained against a party not in any way connected with him, for the consequential damage arising from *his* act of trespass.

¹ Burr. 1113.

² 2 Dow. & L. 203; *Post* PLEADING.

Treating the question as a new one, not governed by the authority of any decided case—for all those referred to are distinguishable—it would seem to be the natural right of each of the owners of two adjoining coal mines, neither being subject to any servitude to the other, to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine, so long as that does not arise from the negligent or malicious conduct of the party.

In the present case it could not be disputed that, but for the excavation of the plaintiff's coal, the defendant would have been entitled to work out the whole of his own coal; for, if the space which it had occupied became afterward filled with water, that would have done no harm to the plaintiff, if his coal also had not been excavated; and, if he afterward excavated his own, and the water flowed in from the defendant's workings, he would not, on that account, have any right of action for the damage done by it. His position would be very similar to that suggested by Lord Holt, in *Tenant v. Goldwin*, where he says: "The case might, indeed, possibly be such, that the defendant might not be bound to repair; as, if the plaintiff made a new cellar under the defendant's old privy, or in a vacant piece of ground which lay next to the old privy before; in such case, the plaintiff must defend himself." Here, however, the working of the two mines has been simultaneous; but, the defendant's mine not being subject to any servitude, what authority is there for saying that the plaintiff, by working his coal, could alter, or abridge the defendant's right to work his own? Surely, the reasonable thing is, that the plaintiff should leave part of his own coal to protect his own workings against the influx of water. The plaintiff, it appears, took that view of the matter and left the barrier, which would have been sufficient for the purpose, but was broken through by a wrong-doer, for whose act the defendant is not responsible.

There are many cases in which the principle has been recognized that one land owner can not, by altering the condition of his land, deprive the owner of the adjoining land of the

¹ Salk. 360.

privilege of using his own as he might have done before. Thus, he can not, by building a house near the margin of his land, prevent his neighbor from excavating his own land although it may endanger the house; nor from building on his own land, although it may obstruct windows, unless, indeed, by lapse of time, the adjoining land has become subject to a right analogous to what, in the Roman law was called a servitude. So also, in *Acton v. Blundell*,¹ where the subject was very much discussed, the court held that one land owner having dug a well on his own land, could not maintain an action against a party who afterward sunk a coal pit in the neighborhood, which had the effect of drawing the water away from his well; the act not being done by the defendant negligently or maliciously, but in a proper manner for the purpose of winning his own coal.

We think that the same principle is applicable to the present case. The water is a sort of common enemy—as was said by Lord TENTERDEN in *Rees v. The Commissioners of sewers for Pagham Level*,² against which each man must defend himself. And this is in accordance with the civil law, by which it was considered that land on a lower level owed a natural servitude to that on a higher, in respect of receiving, without claim to compensation, the water naturally flowing down to it.

There was another point submitted to the court by the special case, but upon which very little was said in argument, viz., that the defendant, by paying money into court in the former action, had precluded himself from saying that he was not liable to be sued. But upon looking at the declaration in that case, it appears that he was charged with erecting a dam, and thereby turning the water into the plaintiff's mine, for which he was of course responsible; and the admission of that cause of action can have no bearing on this.

Upon the whole then, we are of opinion that, upon the facts stated in this special case, the plaintiff is not entitled to recover and that the *postea* must be delivered to the defendant.

Postea to the defendant.

¹ 12 M. & W. 324; *Post WATER.*

² 8 B. & C. 355.

LOGAN ET AL. V. DRISCOLL ET AL.

(19 California, 623. Supreme Court, 1862.)

¹ Prior appropriation of lower, prevents flooding by upper claims.

Plaintiffs owned some claims in the bed of a creek: Defendants owned claims on a hillside above the gulch locations, and in working, covered plaintiffs' claim with tailings, preventing work and destroying their value. Plaintiffs' claims were first located. *Held*, that the rule *qui prior est in tempore potior est in jure* controlled the case, and that defendants were rightfully enjoined from further flooding.

Prevention of mining, a destruction of value. When claims are valuable for mining only, the interruption of their use for such purpose is to defeat the object of their original appropriation.

Sic utere tuo. Because defendants' use of their claims may not be unlawful is no reason to excuse the effect of such use upon the rights of others. It does not prevent the application of the maxim *sic utere tuo ut alienum non laedas*.

² Former decision. "There is nothing in *Esmond v. Chew*, 15 Cal. 137, militating against these views."

Appeal from the Fourteenth District.

Action to recover damages for injuries to plaintiffs' mining claims, and for a perpetual injunction.

The facts are, that plaintiffs were the owners of valuable mining claims, situate in the bed of a stream called "Shady Creek," and had expended large amounts of money in running a cut through solid rock, and in building flumes and dams, and digging ditches for working the claims. The defendants were the owners of claims in the hill above the claims of the plaintiffs, called "Pleasant Hill." A steep gulch, called "Morgan Ravine," led from near defendants' claims to "Shady Creek," and intersected the creek at about right angles with its course at the claims of the plaintiffs.

The defendants, in working their claims, caused large quantities of rock and earth to rush down the hill, by the force of the water they used, which, striking the plaintiffs' claims at right angles, filled up their cut, destroyed their sluices, flumes

¹ *Proctor v. Jennings*, 4 M. R. 265.

² See *Esmond v. Chew*, 5 M. R. 175. Perhaps the former is not overruled by the latter decision, but we would never cite both opinions in the same brief. See *Lincoln v. Rodgers*, 1 Mont. 217; *Post* TAILINGS.

and ditches, and rendered it impossible for plaintiffs to use their claims.

From the testimony of some witnesses for plaintiffs, it would appear that the continuation of work upon defendants' claims involved the total ruin of plaintiffs' claims, and would render property of great value before, utterly worthless. Plaintiffs used every exertion to avoid the difficulties, but found it impossible. Plaintiffs' claims were located and used in the same manner in which they were used at the date of the alleged grievances, long prior to the location of the hill claims by defendants.

Several instructions were asked and given for plaintiffs, and the court, upon its own motion, gave certain instructions, the substance of which was, that a subsequent locator has no right to so work and use his claim, that a prior locator shall be thereby deprived of the use of his claims; or, in other words, that such use of his claim, by a subsequent locator, is not a reasonable use, and that in such case the rule of first in time, first in right, applies.

Defendants, among other instructions, asked the following, which was refused: "Every person is equally entitled to mine upon the public mineral lands of this State and to the use of all necessary requisites to enable him to work the same; and where, from the situation of different claims, the working of some will necessarily result in injury to others, if the injury be the natural and necessary consequence of the exercise of this right, it will be '*damnum absque injuria*,' (damage without injury) and will furnish no cause of action to the party injured."

Verdict for plaintiffs, assessing the damages at one hundred and fifty dollars. Judgment for the amount of the damages assessed, and perpetually restraining defendants from causing refuse matter to flow from their claims down on to the plaintiffs' claims so as to interfere with or obstruct the working of the same. Defendants appeal.

McCONNELL & GARBER, for appellants, cited the brief for appellants in *Esmond v. Chew*, 15 Cal. 138; *Clark v. Foot*, 8 John. 421; *Steele v. Western*, 2 Id. 283; *Lasala v. Holbrook*, 4 Paige Ch. 169; *Bush v. Brainard*, 1 Cow. 78; *Mahan v.*

Brown, 13 Wend. 261; *Parker v. Foote*, 19 Id. 309; 4 Coms. 200, 201; *Partridge v. Scott*, 3 Meeson & W. 220; 9 Barn. & Cress. 725; 6 Bingham's N. C. 1; *Panton v. Holland*, 17 Johns. 92; *Thurston v. Hancock*, 12 Mass. 220.

SARGENT & NILES, for respondents, cited *Hay v. The Cohoes Co.*, 2 Comst. 161; *Palmer v. Mulligan*, 3 Caines, 320; *Anthony v. Lapham*, 5 Pick. 175; *Evans v. Merriweather*, 3 Scam. (Ill.) 496; Angell on Watercourses, Secs. 116, 129; 3 Kent, 440, 572; *Cary v. Daniels*, 8 Met. 466.

GEO. CADWALADER, also for respondents, cited *Esmond v. Chew*, 15 Cal. 137.

COPE, J., delivered the opinion of the court, FIELD, C. J., concurring.

The plaintiffs are the owners of mining claims located in the bed of a creek, and the defendants own claims situated on a hill in the vicinity. The refuse matter washed from the claims of the defendants is deposited upon the claims of the plaintiffs to such an extent as to render the working of them impracticable. The claims of the plaintiffs were first located, and the action is for damages, and for a perpetual injunction.

The case was tried by a jury, and the errors assigned relate to the action of the court in giving and refusing instructions. The court proceeded in conformity with the maxim *qui prior est in tempore potior est in jure*, and there is no doubt that the case is a proper one for the application of this principle. The claims of the plaintiffs are valuable only for the gold which they contain, and the enjoyment of them lies in the use necessary to obtain possession of this gold. To interrupt the use of them for that purpose is to take away the opportunity to enjoy, and to defeat the object for which they were located and taken possession of. That this can not legally be done is indisputable, and it is to us a matter of surprise that a contrary view should have been made the basis of an appeal to this court. If the rule *qui prior est in tempore* were not applicable in such cases, persons engaged in mining operations would hold their rights simply at the pleasure of others,

and the idea of legal protection would be absurd. The defendants contend that so long as the use made of their claims is not in itself unlawful, its effect upon the plaintiffs can not be regarded as a cause of complaint. But this position is in conflict with the maxim *sic utere tuo alienum non lœdas*, and we are not aware of any principle upon which it can be maintained. The defendants are entitled to use their claims in a lawful manner, but no use can be considered lawful which precludes the plaintiffs from the enjoyment of their rights. This being the effect of the operations of the defendants, it is clear that their acts can not be defended on legal grounds. There is nothing in *Esmond v. Chew*, 15 Cal. 137, militating against these views.

Judgment affirmed.

PLANT ET AL. V. STOTT ET AL.

(21 Law Times Reports, New Series, 106. Before the Vice Chancellor, 1869.)

¹ **Injunction to restrain flooding, with accounting and allowance² of expenses.** The proprietors of a coal mine had so worked their mine by opening cuttings to draw off the water therein that they had caused the adjoining mine of the plaintiffs to be flooded, and from such openings the defendants had also abstracted coal from their neighbor's mine, and sold the same for their own benefit. An injunction was granted to restrain the defendants from further proceeding; to stop up the existing openings; from making another further opening which would have the effect complained of and for compensation to the full market value of the coal; with allowance of the cost of searching out the holes which had caused the flooding.

This was a bill filed by the plaintiffs, Thomas Plant and others, against the defendants, James Stott and James Ashworth, under the circumstances and for the relief after-mentioned.

The plaintiffs had been for the last six years before bill filed entitled to all the mines, veins, beds, and strata of coal and ironstone under certain lands called the Jackfields farm, in the county of Stafford. They had worked this coal to a considerable extent, and had employed a large capital, and

¹ *Cole Co. v. Virginia Co.*, 1 Saw. 470, 686; *Post* INJUNCTION.

² *Stockbridge Co. v. Cone Iron Works*, 6 M. R. 317.

made large profits by such workings. The defendants were, during the same period, the owners of and worked other coal mines under lands called the Banktop lands, lying to the east and rise of the said Jackfields farm. There were several veins or seams of coal which ran continuously underneath both the Banktop lands, in the possession of the defendants, and the Jackfield lands, in the possession of the plaintiffs, with an inclined slope or dip from the Banktop lands to the Jackfield lands.

There was, in particular, amongst such veins or seams, one of valuable coal, called the Rowhurst seam, which was a seam or vein of such a nature as to allow water to percolate and pass through it; but the stratum or upper boundary of the Rowhurst seam, which formed the roof, and also the stratum which formed the floor upon which the Rowhurst seam rested, were impervious to water; the said other seams or veins were generally of a like character, and had like roofs and floors. The water which entered the Rowhurst seam on the Banktop lands percolated to the bottom of the same seam in the Jackfield lands. The plaintiffs and defendants had respectively large pumps and engines for raising the water which collected in their respective mines, and they had been in the habit of pumping out such water to the surface, and so getting rid of it.

In November, 1867, as alleged by the bill, the plaintiffs discovered that the defendants, shortly prior to March, 1866, and for some time thereafter, continued these workings from their Banktop mine into and under parts of the Jackfield lands, and partly into the said Rowhurst seam under the same lands, and excavated large quantities of coal, the property of the plaintiffs, from under the Jackfield lands, and sold and applied some of it to their own use. That the defendants, in continuing the said workings into and under the plaintiffs' mines, opened up deep headings and artificial channels and communications leading from the defendants' workings into the excavations and workings made by defendants in the plaintiffs' land; that such workings within the plaintiffs' bounds were done secretly and without the knowledge or sanction of the plaintiffs; that by reason of such communication a large body of water flowed from the defendants' mines

through the headings and channels into such excavations under the plaintiffs' land, and collected there in great quantities; that defendants had also made within their own mines cruts or openings, and channels or pipes, through both the plaintiffs' and defendants' mines, and particularly above the seam called the Rowhurst seam, so as artificially to let large quantities of water, the contents of the overlying seams, into the underlying seams or veins, and particularly into the Rowhurst seam; that such cruts and openings had not been made for the purpose of properly working the coal in the defendants' mines, but for the purpose of conducting the water from the upper seams into the lower seams, particularly into the Rowhurst seam, and for the purpose of thereby drawing the water from the defendants' mines into the plaintiffs' mines; that this had caused much injury to the plaintiffs' property; that such water continually arose from the increases by the ordinary workings and getting out of coal by the defendants within their mines and colliery, and that, so long as cruts or openings, or channels or pipes existed, and no proper barrier was made below the defendants' mines and the plaintiffs' mines, the water arising from such ordinary workings would flow into plaintiffs' mines. That such cruts or openings, channels or pipes, also increased the flow of water through the workings in the defendants' mines, and which water arose from such ordinary workings and getting out coal, and by means of the openings or communications made by the defendants' mines as aforesaid, the plaintiffs' bounds and workings made by the defendants under the plaintiffs' land as aforesaid, were deteriorated. That the collection of water by these means in the last mentioned excavations or workings, not only greatly increased the quantity of water that flowed into the plaintiffs workings, and which had to be pumped out by the plaintiffs, but also prevented the plaintiffs from working the coal within their mines without danger, and rendered a large quantity of such coal valueless. That plaintiffs had lately been compelled to expend large sums in pumping out the water which the wrongful acts of the defendants had sent into the plaintiffs' mines, and they would be obliged to continue such expense unless defendants were restrained as prayed by the bill.

The bill also alleged that the damage done by the defendants' acts, by the quantity of water flowing in from defendants' workings, was so great that the plaintiffs' workings were likely to be drowned out, and irreparable injury would be occasioned if the defendants were not restrained as prayed. That the defendants ought to be compelled to close up the openings or communications so made by them, and to make a proper barrier on their side of the said Rowhurst seam, to prevent the water flowing through into the plaintiffs' mines.

The bill therefore prayed that the defendants, their agents, etc., might be restrained from further digging any coals or carrying any workings into or under the said Jackfield lands. That they might also be restrained from making any cruts or openings, or channels or pipes, or from doing any other acts to conduct water from any of the upper seams within their mines into the lower seams so as to send such water through such lower seams into the plaintiffs' mines. That defendants might also be ordered to stop up the openings and communications made by them from their mines into the plaintiffs' mines, and to prevent by sure and sufficient barriers the water conducted by such cruts or openings, or channels or pipes, into the lower seams, from passing through such lower seams into the plaintiffs' mines. For an injunction to restrain the defendants from getting more coal from said Banktop colliery, and for an account and compensation.

The defendants denied many of these allegations, and evidence was entered into on both sides in support of their respective cases by surveyors, viewers and others.

The Vice Chancellor said it was quite clear that the plaintiffs were entitled to the relief prayed by their bill. The defendants had not only injured the plaintiffs in their occupation of obtaining the coal from their own mine, but they had actually entered upon their neighbor's property, and obtained coal which in fact belonged to the plaintiffs, and sold it for their own benefit. This, of course, could not be allowed, and the injunction must go in the terms of the prayer of the bill. An account must also be directed, of the full market value of the coal extracted. It appearing that the lease to the defendants of their mine would expire in five years' time, and that of the plaintiffs in eleven years, should

the defendants obtain a renewal of their lease, they would, of course, be liable to a similar injunction. The plaintiffs would then have liberty to apply to the court. He should also, in addition to the usual costs, direct that the costs properly incurred by plaintiffs in ascertaining the openings in the defendants' mine which had caused the injurious flow of water into the plaintiffs' mine, should be paid by the defendants.

Injunction and decree accordingly.

CROMPTON V. LEA.

(Law Reports, 19 Equity, 115. Before the Vice Chancellor, 1874.)

Flooding mine by tapping river bed, enjoined. A bill averred that a mine which the defendant threatened to work could not be worked without letting in a river and flooding defendant's mine, and through that, the plaintiff's mine, which lay on the dip of the coal seam below the defendant's mine, and prayed an injunction. Demurrer to bill overruled, and case distinguished from the ordinary instance of the lower mine having no protection from water produced in the upper mine as the result of working in ordinary cases.

Upper and lower mines on same dip. Each coal mine on the dip is entitled to the whole of its coal, leaving the water to take its own course; but this does not allow the owner of the upper mine to draw foreign water into it from a river, and let it down on the lower mine.

¹ Barriers—Foreign water. The owner of the lower mine can only protect himself from the water coming from the upper mine on the dip by leaving barriers; but a failure to leave barriers does not justify the owner of the upper mine in drawing foreign water into it and letting it flow upon the lower mine.

Demurrer.

The material allegations of the bill were as follows:

"1. The river *Douglas* is a natural watercourse of considerable volume flowing through the town of *Wigan*, and is liable to heavy floods. In its course through *Wigan* it flows over the outcrop of two seams of coal known as the *Wigan Five Feet Mine* and the *Wigan Four Feet Mine*. The outcrop of the *Wigan Four Feet Mine* intersects the river *Douglas* at the northwest corner of a field hereinafter referred

¹ *Phila. Co. v. Taylor*, 5 M. R. 133; *Phillips v. Homfray*, L. R. 6, Ch. 770.

to as *Eccles' Field*, in *Wigan*, which field and the mines thereunder belong to and are in the possession of the defendants.

"2. The outcrop of the *Wigan Five Feet Mine* intersects the said river at a point about 200 yards higher up the stream.

"3. The plaintiff is the lessee of large portions of the said *Wigan Five Feet Mine* and *Wigan Four Feet Mine*, and also of a lower seam of coal called the *Wigan Nine Feet Mine*, all which seams he is now engaged in working.

The dip of the seams and of the containing strata is such that the plaintiff's mines are lower than the same mines under *Eccles' Field*, and the flow of water would be from defendant's toward the plaintiff's mines.

"4. Both the *Four Feet Mine*, which is four feet six inches in thickness, and the *Five Feet Mine*, which is four feet in thickness, were extensively worked many years ago close up to the outcrop. The workings in the *Four Feet Mine* vary in depth from the surface in *Eccles' Field* from six feet to six or seven yards, and at the point where the outcrop of the said mine intersects the river *Douglas* the workings approach within a distance of six feet from the bed of the stream. The roof in the said workings was left supported by narrow pillars of coal, so that the said mines are honeycombed in all directions, the surface resting on slender pillars. The precise date at which these old workings near the outcrop were made, and their exact dialling, can not now be ascertained, but it is certain that they communicate with all the workings in the said three seams belonging to the plaintiff.

"5. Owing to the insufficient support by the said pillars, the surface both in *Eccles' Field* and at the outcrop of the *Five Feet Mine*, higher up the stream, has more than once given way on the occasion of heavy floods."

The bill then specified two occasions when the flood ultimately filled all the workings in the five feet, four feet and nine feet seams and burst the walls of the shafts of the *Ince Hall Colliery*, of which Messrs. *Whaley & Gerard* were lessees, rushed down the shafts to the workings in the seam with such force and fury, that the surface of the earth trembled at the pit top. On this occasion six miners and many horses were drowned.

"6. Part of the mines formerly worked by Messrs. *Whaley & Gerard*, so flooded as above, was leased to them by a predecessor in title of the lessor of the plaintiff, Messrs. *Whaley & Gerard* occupying such portions of the *Wigan Five Feet Mine* and the *Wigan Four Feet Mine*, under the lessor's lands, as were within a depth of 200 yards from the surface. The plaintiff has a lease of and is working those portions of the said mines under the same lands which are below that depth, and of the whole of the *Wigan Nine Feet Mine* thereunder, the lease to Messrs. *Whaley & Gerard* having expired many years ago. The workings of the plaintiff commence directly with those left by Messrs. *Whaley & Gerard*. All the intervening parts of the said *Wigan Five Feet* and *Wigan Four Feet Mines* have long been worked out, with the exception of the pillars left for the support of the surface, and there is complete communication between the plaintiff's said mines and the old workings under *Eccles' Field*.

"7. Shortly after the inundation a joint arrangement was entered into by the owners of the several collieries aforesaid, to repair the breaches, and do what was necessary for mutual protection. After obtaining the consent of Messrs. *Eccles*, the then owners of *Eccles' Field*, aforesaid, and of Messrs. *Heron & Whitaker*, the proprietors of the fields higher up the stream where the water broke in, the owners secured the roof of the old workings by building pillars, and by timbering and otherwise. They also filled up the holes with earth, leaving, as stipulated by the proprietors, a walled pit or entrance into the old workings, the head of the pit being elevated a few feet above the surrounding surface. They also put dams into some drifts between their colliery workings and the old workings, and it was supposed that those dams cut off all communication between the present workings and the river. However, a short time afterward the river again burst through into the five feet seam at the same place as before, but the dam proved ineffectual and the water again completely filled the *Bullock's Colliery*, and a large portion of the *Holme House* workings, and caused considerable damage to property.

"8. In 1857, 1860 and 1872, the river Douglas again broke into the old workings of the five feet and four feet seams at the same places.

"9. In the Eccles' Field, the scene of those disasters, the defendants have, within the last few weeks, commenced sinking two shafts for the purpose of winning and working the mines of coal under and adjacent thereto."

"10. The bill then stated that under the *Eccles' Field* lay the following mines: 'The *Four Feet Mine*, twelve feet below the surface; the *Nine Feet Mine*, eighty-one feet below the last-mentioned mine, and seven and a half feet thick; the *Cannel Mine*, 200 feet below the *Nine Feet Mine*; the *King Coal*, 300 feet below the *Cannel*; the *Ravine Mine*, 120 feet below the *Cannel*, and six feet thick; the *Yard Coal*, 112 feet below the *Ravine* and three feet thick; the *Bond Coal*, 102 feet, the *Smith Coal*, 225 feet, and the *Arley Mine*, 420 feet below the *Yard Coal*.'

"11. In the actual condition of the workings in the *Four Feet* and *Five Feet Mines*, any operations that cause a movement or disturbance in the strata below those mines will necessarily and inevitably cause the pillars in the old workings to give way, and the surface, and with it the river-bed, will fall in. The water of the river, instead of flowing in its accustomed channel, will then flow into the hollows in the defendants' said fields, and thence into the plaintiffs' mines.

"12. In consequence of the short distance between the *Four Feet Mine* and the *Nine Feet Mine*, it is absolutely impossible, by any known method of working, to work the latter mine without dislocating and disturbing the superincumbent strata, and bringing down the pillars in the *Four Feet Mine*. The same result will also inevitably be produced in any of the following events, that is to say: If the *Cannel Mine* is worked otherwise than by leaving at least one half of the coal ungotten as and for pillars evenly distributed throughout the mine for the support of the superincumbent strata. If any portion of the *King Coal* is worked, and if the *Ravine Mine*, or any of the lower mines, be worked without leaving at least one half of each of these respective mines ungotten as and for pillars, evenly distributed throughout the said mines, for the support of the superincumbent strata.

"13. In truth, the only legitimate use to which the upper seams of coal in *Eccles' Field*, aforesaid, can be put is to serve as a pillar for the support of the river bed and the ad-

jacent surface, and the manner in which these upper seams have been worked has made it impossible further to work them for any mining purpose. The same considerations apply to the fields adjoining *Eccles' Field*.

"14. Since 1847, the workings under the principal Wigan coal fields have been enormously developed, and there is intercommunication among them all, and where there is a barrier, it is too slight to resist the pressure that would arise from letting the river into any part of the coal fields.

"15. On the 27th of July, 1874, Mr. *Peace*, the solicitor for several master coal miners whose mines are endangered by the defendants' acts, wrote to the defendants a letter calling their attention to the danger that would result from their working the mines under the property in *Wigan*, lately belonging to Mr. *Eccles*, alongside the river *Douglas*. The letter inclosed an extract from the report of Mr. *Dickinson*, Her Majesty's inspector of coal mines for 1851, and having warned the defendants of the danger of their proceedings, intimated that unless they received a satisfactory answer they must take proceedings to protect themselves.

"16. Notwithstanding this letter, the defendants persist in their determination to work the said seams, and are continuing to sink and make shafts in *Eccles' Field*. The shafts are made without adequate protection at the surface against the overflowing of the *Douglas*, and are insufficient to keep out the water in the event of any flooding of the hollows in the *Four Feet Mine*.

The defendants also threaten and intend to work all the coal mines under and near to the field. To do so, will inevitably bring down the pillars in the old workings in the four feet and five feet seams, and will thereby cause the bed of the *Douglas* to break in, and through the fissures and holes thus made the river will flow into the old workings in all the collieries in the said coal field. The lives of a great number of men will be jeopardized, and immense and irretrievable damage will be done to the plaintiff's property.

"17. The plaintiff charges that sinking the said shafts and working the said mines in the manner threatened, will occasion an unjustifiable trespass on the plaintiff's property, irreparable and incapable of being compensated in damages, and which ought to be restrained by injunction.

"18. The defendants have only recently acquired their property which they did acquire with a full knowledge of the facts above stated and especially that the old workings in the *Four Feet* and *Five Feet Mines* respectively communicate underground with the plaintiff's several collieries."

The bill then prayed that the defendants might be restrained from permitting the said shafts in *Eccles' Field* to remain without a wall or dams sufficient to resist and keep out the overflow of the *Douglas*, and from continuing the said shafts through any mine of coal or pervious stratum without protection or tubing, or without making the lining of sufficient strength to prevent water flowing from the hollows of the four foot seam down the shaft to the lower mines; 2, also from disturbing any coal or pillars in the *Wigan Four Feet Mine* under or near *Eccles' Field*; 3, from working the coal in the *Wigan Nine Feet Mine* under or near *Eccles' Field* aforesaid; 4, from working the *Cannel Mine* under *Eccles' Field*, otherwise than by leaving at least one half of the mine ungotten, as and for pillars evenly distributed throughout the mine for the support of the roof and the superincumbent strata; 5, from working the *King Coal* under or near *Eccles' Field*, as aforesaid; 6, from working the *Ravine Mine* or any mine below it, under or below *Eccles' Field*, otherwise than by leaving half of the coal of each ungotten, to serve for pillars to support the roof; 7, and from doing any acts causing the *Douglas* to flow into any of the old workings of the *Wigan Four Feet or Five Feet Mines*.

Sir CHARLES HALL, V. C.

This is a case of considerable importance to the parties, and to other owners of mines. The case has been very ably argued on both sides; and if I thought that by further consideration I should be likely to come to a different view, I should certainly have deferred giving my judgment upon it. The question being one of some novelty, and as I have said of importance, and there being a motion for an injunction pending on the result of the hearing of this demurrer, I think I ought not to delay stating my view of the case.

The plaintiff is the lessee of certain mines described in the

bill which lie in the dip of certain mines which are owned by the defendants. In that state of things, of course the natural water to be found in the mine of the defendants would flow into the mine of the plaintiff; and in the ordinary working of the mines of the defendants, the plaintiff would be subject to that inconvenience. He can not complain of that. Like every other mine owner on the dip, he takes subject to the common enemy, the water, finding its way into his mine in the ordinary course of gravitation in the common working of mines. He could only protect himself against that if he could protect himself at all, and probably he could, by leaving a barrier to prevent the water coming into his mine. He was not bound to leave a barrier. Each of the owners is entitled by law to get out the whole of the mineral from his mine, leaving the water to take its own course. The plaintiff says, and that is his case, that, "although I can not complain of the water flowing to my mine from your (the defendants') mine in ordinary course, I have a right to complain of this—I have a right to complain that you are now about to get mineral out of your (the defendants') mine, so near to a river which flows over that mine that the consequence of your workings will be that the river will flow into your (the defendants') mine, and thence flow into my mine" and it is the plaintiff's contention that if the act had been done and injury occasioned, he would be entitled to maintain an action against the defendants; the question to be tried on this demurrer is, whether such an action would lie. If the action would lie, then the injury must be prevented, if the case be one for the exercise of the jurisdiction of this court by means of injunction.

There seems to be no authority which entirely covers the case; but in considering the case I must attend to what the statements of the bill are, in reference to the position of the defendants' mines and what remains to be got of those mines. The upper mines, or seams of coal, seem to be three: the *Five Feet Mine*, the *Wigan Four Feet Mine* and the *Wigan Nine Feet Mine*. Then there are a number of mines which lie at a very great distance from these, much deeper down. In the fourth paragraph of the bill the *Four Feet Mine* and the *Five Feet Mine* are stated to have been extensively worked many years ago, when the workings were carried almost close

up to the outcrop. "The workings in the *Four Feet Mine* vary in their depths from the surface in *Eccles' Field*, aforesaid, from six feet to six or seven yards, and at the point where the outcrop of the said mine intersects the river *Douglas*, the workings approach within a distance of six feet from the bed of the stream. The roof in the said workings was left supported by narrow pillars of coal, so that the said mines are honey-combed in all directions, the surface resting on slender pillars."

The bill states that the plaintiff does not know exactly when that took place. Then, referring to certain breakings in of the water, the statement in the ninth paragraph of the bill is that the defendants have recently commenced sinking two shafts for the purpose of winning and working, what I collect from that paragraph when taken in connection with other passages in the bill, to be, all the mines. There is a description given of what these mines are in the next paragraph. Then it is stated in the eleventh paragraph, "That in the actual condition of the workings in the *Four Feet* and *Five Feet Mines*, any operations that cause a movement or disturbance in the *strata* below those mines will necessarily and inevitably cause the pillars in the old workings to give way, and the surface, and with it the river bed will fall in. The water of the river, instead of flowing on in its accustomed channel, will then flow into the hollows in the defendants' said field, and thence into the plaintiff's mines."

Then paragraph twelve states, "In consequence of the short distance between the *Four Feet Mine* and the *Nine Feet Mine*, it is absolutely impossible by any known method of mining to work the latter mine without dislocating and disturbing the superincumbent *strata* and bringing down the pillars in the *Four Feet Mine*. The same result will also inevitably ensue in any of the following events (that is to say)."

The other statements have reference to the lower mines; and in paragraph thirteen it is said, "In truth, the only legitimate use to which the upper seams of coal, *Eccles' Field* aforesaid, can be put is to serve as a pillar for the support of the river bed and the adjacent surface; and the manner in which these upper seams have been worked has made it impossible further to work them for any mining purpose. The same considerations apply to the fields adjoining *Eccles' Field*."

If I understand that paragraph to be a statement of fact, which I do, and not wholly or in part the conclusion of law to be derived from the preceding statements, we have there an averment that these upper mines of the defendants can not be worked further; that it is impossible to work them further for any mining purposes.

Therefore, if that be so, what is alleged as regards the defendants is, that they are proposing to do something which will not result in a mining operation at all for their own advantage or profit; that they will get no benefit from it whatever. That being so, it is stated in the 16th paragraph of the bill that "The defendants also threaten and intend to work all the said coal mines under and near to the said fields. To do so will inevitably bring down the pillars in the old workings in the four feet and five feet seams, and will thereby cause the bed of the river *Douglas* to crack and break in, and through the fissures and holes thus made the whole of the water in the river will flow into the old workings and thence into all the collieries in the said coal field."

That is the case made by the bill, and, in substance, I understand it to be this: You, the defendants, having these upper mines of yours, or at least two out of the three having been very extensively worked in former times, pillars having been left for the support of the surface, are now proposing to recommence mining operations in those mines. You are proposing to further get minerals out of these, but your doing so, having regard to the previous mining, can not be of any use whatever, having regard to the former workings, and what you propose to do will necessarily result in this: that the bed of the river will immediately fall in, and this flowing stream, which is now existing as a flowing stream, will immediately be precipitated into this mine of the defendants, and thence into the mine of the plaintiff. The defendants say that in that state of things they are entitled to do what will produce that result, and the question is, whether they are entitled to do so in point of law. The cases which have been referred to, or rather certainly the general principle applicable to the case as stated in *Smith v. Kenrick*, 7 C. B. 515, and cases of that sort, are very simple and well settled and clear. As I have said before, the party who has got the mine in the dip must

take the risk of the water flowing when the mining operation is going on in a regular way. Every one has a right to use his land or mine and make the most of it, subject ordinarily to the rule that he must use his property so as not to injure his neighbor. Ordinarily he is bound to take care that nothing wanders from his property on to his neighbor's so as to injure him. But, in applying that qualification of the ordinary rule, it is well settled that the case of underground water flowing from ordinary and proper mining operations does not come within it, and, therefore, the lower proprietor must take subject to that risk. That is what cases like *Smith v. Kenrick* decide.

On the other hand, *Bird v. Williamson*, 15 C. B. (N. S.) 376, is an example of a case of a different kind, where it is said, if you do work you must only work in the ordinary, proper and skilful way, and must not accumulate a mass of water and then throw that water in a mass upon the proprietor whose mine is lower down; you are not entitled to do that. In respect of that an action will lie. Then the question is, whether an action will lie, taking the facts and statements of this bill as they are alleged, if the bed of this stream were tapped, under the circumstances stated in the bill; because it is said the defendants are going to tap this water, not for any proper mining purpose of their own, because it would do them no good, inasmuch as the result of the working would be of no benefit to the defendants; that they would not derive any benefit from it is the statement. It is alleged by the plaintiff that the defendants have no right to do that which is not an ordinary mining operation in working of minerals and allowing the ordinary water to percolate and gravitate down into the lower mine, whether it be water which is collected during the mining operations, or which from some preceding mining operations may have been collected. Each party has claimed the benefit of the judgment in *Rylands v. Fletcher*, Law Rep. 3 H. L. 330; and Mr. Dickinson, in his very able criticisms on that judgment, has said the Lord Chancellor in that case drew the distinction between the use of the close and the use of the water, and that he there refers to the accumulation of water either on the surface or underground; and he says it would be an idle distinction to make be-

tween a mass of water on the surface accumulated there, and water not stationary but flowing, and only a mass of water differing from an ordinary reservoir in that it is flowing water. But the Lord Chancellor's judgment in *Rylands v. Fletcher* must be read and understood with reference to the case before him.

His observations were not directed, nor did he mean to say anything, as I understand the judgment, in reference to what would be the law if a man were to tap a river which was flowing over the surface of the mine, and thereby inundate all the proprietors below. I do not see, as Mr. *Herschell* submitted on this point, why a mine owner who is lower down should be in a worse position, or less entitled to complain of an injury occurring to him from such an act, such a throwing down of the water upon him, than a riparian proprietor, or one who is not immediately a riparian proprietor, or one considerably inland. If any injury should accrue in consequence of the interference with the flow of a river in that way, I do not see why any person who sustains an injury in consequence of that which must be a wrong to somebody—for at all events it must be a wrong to somebody—is in a worse position than other persons who would have an undoubted remedy. I do not consider that the observations of the Lord Chancellor in *Rylands v. Fletcher* are, in fact, in favor of the defendants in this case. I take the rule to be as stated in the judgment of Mr. Justice BLACKBURN, which is stated in *Rylands v. Fletcher*, Law Rep. 3 H. L. 339, "We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or perhaps, that the escape was the consequence of *vis major* or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reser-

voir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damaged without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his own property (which was not naturally there) harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence.

And upon authority this we think is established to be the law, whether the things so brought be beasts or water or filth or stench, and the Lord Chancellor says: "In that opinion, I must say I entirely concur." It is said, however on behalf of the defendants here, that within the meaning of the law as there laid down, what is alleged in this bill as being the consequence of the defendants' acts, is not within the letter or reason of this view and those opinions—that is to say, it is said the defendants will not, within the meaning of that judgment be bringing the water upon the mine. I say that will be bringing the water on their own mine, and that they will not bring it the less because they do not desire it to come; I must take it to be the fact upon the statements on this bill that it will be the inevitable consequence of what they propose to do. Is it less a case in which an action will lie because it is merely the inevitable consequence of their act, than it would be, if for some purpose of their own, *e. g.* for the purpose of working the mine? Moreover, in this particular case they do it apparently not for any legitimate mining purposes whatever, because, according to the statements in the bill, their working the three seams can not result in any real advantage. It also appears to me that the observations in *Smith v. Fletcher*, Law. Rep. 9 Ex. 64, are important, because in that case the Chief Justice, Lord COLERIDGE, says, in reference to the new trials, that it was desirable "that the opinion of the jury should be taken as to whether what was

done by the defendants was done in the ordinary, reasonable and proper mode of working the mines." It being essential, apparently, according to that, that it should be an ordinary, reasonable and proper working of the mine, I can not, upon the statements of this bill, say that the defendants are proceeding to do that which can be so described, namely, an ordinary, reasonable and proper mode of working these three seams of coal. I say that it appears to me just the reverse, and that the defendants are doing something without any good, proper or reasonable object; and applying the law as I consider I find it in *Rylands v. Fletcher*, Law. Rep. 3 H. L. 330, and *Smith v. Fletcher*, it appears to me it is impossible for me to say there is not in this bill something stated entitling the plaintiff to some relief.

Another branch of the argument has been that it is the plaintiff's own fault that this water will find itself there, because he might have left a barrier, and that he has partly worked out his mine. But he had a perfect right to work his mine partially or wholly, and to work it up to the very margin of his neighbor's mine. The defendants' mine is not actually the adjoining mine nor was it in the case of *Rylands v. Fletcher*, Law Rep., but for this purpose it may be treated as the same. Therefore, that is no answer to the case nor is it any answer to say that, supposing neither mine had been worked at all, the plaintiff would have had no ground to complain. If neither mine had been worked, he might have gone on and got his mine out, and the water would not have found its way into his mine. If, on the working of the defendants' mine, the workings had come so far as to let the water flow into the plaintiff's mine before it was completely worked out, then he would, I think, have had a case. Upon the whole, it appears to me, that the plaintiff's bill is one which he is entitled to have answered, and I must overrule the demurrer.

Solicitors for plaintiff: MESSRS. SHARPE, PARKERS and PRITCHARD.

Solicitors for defendant: MESSRS. GREGORY, ROWELIFFES and RAWLE.

¹SMITH V. FLETCHER ET AL.

(L. R. 9 Ex., 64. Exchequer Chamber, 1874.)

¹Lower mine flooded by bursting of artificial channel, diverting water-course. Defendants' mine adjoined and communicated with the plaintiff's, and on the surface of defendants' land were certain pits made by them. Across this surface ran a watercourse which had been diverted by them into a new channel. The banks of this new channel burst as the result of an exceptionally heavy downfall of rain, gathered into the pits and thence drained into plaintiff's mine. Defendant was guilty of no actual negligence. If the pits had not existed the water would not have penetrated plaintiff's works: *Held*, that the case was distinguishable from *Rylands v. Fletcher*. That negligence was not essential to render defendant liable; that the water coming from the natural overflow, and that coming from the diversion of the watercourse might admit of different considerations, and that it was material to be found as a fact whether what was done by the defendants was done in the ordinary and proper working of the mine.

Appeal by the defendants from a decision of the Court of Exchequer discharging a rule to enter a nonsuit, or for a new trial. The pleadings and facts are fully stated in the report in the court below. (Law Rep. 7, Ex. 305.)

HOLKER, Q. C. (KAY, Q. C. and BAYLIS with him), for the appealing defendants.—The defendants are not responsible. They did not make the openings and cuts on their land in order to store water, and this renders the case of *Rylands v. Fletcher*, Law Rep. 3 H. L. 330, 18 L. J. (C. P.) 172, inapplicable. There the defendant made a reservoir to store water. Here the openings and cuts were made in the ordinary course of working the mine. There is no suggestion, either of negligence on the defendants' part, or of any abnormal mode of working. The water which did the mischief came, during a heavy flood, by gravitation. *Smith v. Kenrick*, 7 C. B. 515, is in point. The mischief in that case, as here, was caused by the ordinary process of working the mine, and although damage resulted to the plaintiff, it was held that the defendant was not responsible. In *Baird v. Williamson*, 15 C. B. (N. S.) 376, 33 L. J. (C. P.) 101, the distinction is drawn between water flowing by gravitation from one mine

¹ S. C. on appeal to the House of Lords, 5 M. R. 78.² *Rylands v. Fletcher*, 6 M. R. 129.

to another, and water sent by the active interference of the mine owner. In respect of the latter he would be responsible.

(Lord COLERIDGE, C. J.—The question before us seems really to be one of fact. Did this water come simply by natural causes into the plaintiff's mines? If so, *Smith v. Kenrick*, would be applicable. Or, on the other hand, did the defendants, as the court below seem to have thought, cause the water to come there? If they did, the ruling of the Court of Common Pleas in *Baird v. Williamson*, as to the water pumped to a high level, would apply.)

The proper inference to be drawn is, that the defendants did nothing actively to bring the water.

(Lord COLERIDGE, C. J.—They made a "cut" from the bottom of one of the hollows, and also altered the channel of a watercourse.)

The watercourse was really improved and enlarged, and the defendants desired to give evidence of this, and also that they had taken all reasonable precautions to prevent damage. But the learned judge rejected evidence on both points, conceiving that *Rylands v. Fletcher*, governed the case. As to the "cut," that was analagous to the passage or "crut" made by the defendant in *Baird v. Williamson*, from one seam to another, and which, it was held, he was justified in making in the usual course of working. The working, therefore, being usual, and there being no negligence, the defendants were not liable for the consequences of an extraordinary flood: *Carstairs v. Taylor*, Law Rep. 6 Ex. 217; *Tennent v. Earl of Glasgow*, Court of Session Cases, 3d Series, 133.

HERSCHELL, Q. C. (CROMPTON with him), for the plaintiff.—The natural consequence of the defendants' act was to bring the water into the openings and hollows in their land, whence it flowed through the cut into the plaintiff's mines. It is true that the openings were not made on purpose to store water, but that can not make any difference; the result is the same. *Smith v. Kenrick*, only decides that if subterranean water, collected in underground workings in the ordinary course of mining, escaped without the mine owner's negligence he would not be liable. But what may be called "mine water" proper, is subject to different considerations from water collected on the surface of the land by quarrying.

(Lord COLERIDGE, C. J.—We must take it that the defendant's workings, both underground and on the surface, were ordinary and usual.)

At all events, they create a state of things on the surface of which the necessary consequence is that water will accumulate. The principle of *Rylands v. Fletcher* therefore applies, and it was not necessary to prove any actual negligence. The defendants choose to collect what, to their knowledge, may do damage in certain circumstances, and if damage is done they are absolutely responsible: *Ruck v. Williams*, 3 H. & N. 308, 27 L. J. (Ex.) 357. *Baird v. Williamson*, 15 C. B. (N. S.) 376, 33 L. J. (C. P.) 101—so far as the third class of water is concerned, viz., the water raised by pumping—is in the plaintiff's favor. The defendants here, by making the cut and diverting the stream, did actually cause the water to flow into the plaintiff's mine, and it is no answer to say that if the stream had not been diverted more water would have overflowed.

HOLKER, Q. C., was not called on to reply.

Lord COLERIDGE, C. J.:

We concur with the court below that it is impossible to enter a nonsuit, but we are further of opinion that there ought to be a new trial. The case appears to us to have been stopped too soon. The learned judge seems to have been of opinion that the case was one in all respects within *Rylands v. Fletcher*. We do not think that it was, in every respect or in every conceivable aspect, within that authority; and if evidence had been given on behalf of the defendants, we think there might have been questions for the consideration of the jury.

Again, the learned judge drew no distinction between the water which came from the new diversion of the stream and that which came from the natural overflow. We think that what may be called these two sets of water may admit of very different considerations.

As there is to be a new trial it is unnecessary to say more, except that we think it desirable that the opinion of the jury should be taken, as to whether what was done by the defend-

ants was done in the ordinary, reasonable and proper mode of working the mine.

KEATING, QUAIN, GROVE, ARCHIBALD and HONEYMAN, JJ., concurred.

Judgment reversed.

Attorneys for plaintiff: HELDER & KIRKBANK.

Attorneys for defendants: GREGORY, ROWCLIFFES & Co.; for Musgrave, WHITEHAVEN.

EBENEZER WILLIAMS V. POMEROY COAL CO.

(37 Ohio State, 583. Supreme Court, 1882.)

Statute of Limitations, where flooding ultimately results from original trespass. Defendant, lessee of a coal mine, worked across bounds into the land of an adjoining proprietor, in 1861. In 1862, he quit work and surrendered the lease. The plaintiff purchased the adjoining land so trespassed upon, in 1864, worked it for coal, and, in 1868, tapped the water in defendant's abandoned workings where defendant had crossed the line. This necessitated pumping. Plaintiff commenced action for the cost of drainage in 1873; *held*, that the Statute of Limitations began to run from date of the original trespass, and that the action was therefore barred.

The purchaser of lands can not recover for antecedent trespasses.

Trespass distinguished from nuisance. The cause of action against a trespasser where the ultimate injury is a flooding chargeable to the trespass, is still the original trespass, and he is not answerable as for creating and maintaining a nuisance.

Underground and unknown trespasses. In the application of the Statute of Limitations, there is no distinction between trespasses underground and upon the surface; nor whether the action is known or unknown to the plaintiff within the time limited by the statute.

Consequential damages barred. The bar to a recovery in an action for a trespass, includes all the consequences resulting from such trespass.

Error to the District Court of Meigs County.

The original action was commenced by Ebenezer Williams, plaintiff in error, against the Pomeroy Coal Company, the defendant in error, February, 1873, in the Common Pleas Court of Meigs county.

The facts as they appear in the record are substantially as follows;

Prior to January 30, 1868, one Nahum Ward owned in fee lot 1223, on the Ohio river, in Meigs county, and at the same time one Phillip Hondesheldt was the owner in fee of lot 1222, and V. B. Horton was the owner in fee of lot 301, and the latter had a lease from Hondesheldt granting the right to mine all the coal under the south half of lot 1222. On August 10, 1858, Mr. Horton conveyed to the Pomeroy Coal Company, by his lease of that date duly executed, his right to mine and take away the coal under said two tracts of land. By the terms of said lease the Pomeroy Coal Company bound itself to "quit and surrender the premises" at the end of ten years, to wit, by August 10, 1868. The defendant entered upon the premises, and as early as 1862 had mined all the available coal thereon, and did, in that year, abandon the said lease, with the consent of the said Horton, and turned over to him the abandoned mines on said premises. The defendants, while excavating the coal on lot 1222, mined over on to the adjoining lot 1223, from thirty-six to thirty-nine feet. In 1864 the plaintiff bought lot 1223 of said Nahum Ward, and began operating the mines thereon. In June, 1868, the workmen engaged in said plaintiff's mine tapped the water which had accumulated in the abandoned mine, and it flooded the mine of plaintiff.

The working over on lot 1223 was done as early as 1861, but was not known to the plaintiff until the water flowed into his mine, as above stated.

On the trial, the plaintiff, among other things, requested the court to charge the jury as follows:

"That if the jury find that the water from the mine of the defendant commenced to flow into the mine of the plaintiff more than four years before the commencement of this action, and has continued to flow from that time up to the present time, and the plaintiff has continually, from that time to this, been compelled to pump the same out of his mine at a great expense in order to enable him to work his own mine, then he is entitled to recover all damages he has sustained within four years before the commencement of this action."

This instruction the court refused to give, but instructed

the jury, in substance, that if the flowage of water from the old mine of the defendant into the mine of the plaintiff commenced more than four years before the bringing of the suit, the right of action was barred by the Statute of Limitations.

The jury returned a verdict for the defendant, on which judgment was rendered. The district court on error affirmed the judgment.

The present petition in error is prosecuted to reverse these judgments.

SIMEON NASH, and J. J. GLIDDEN, of O'Connor, Glidden & Burgoyne, for plaintiff in error.

There was no damage claimed in this action, occurring from this flow of water, until the flow began. An action of trespass could only have been brought for the trespass and value of coals removed; these consequential damages had not then occurred, hence the owner of the land could not have recovered for the damages now sued for. Here the cause of action arises, not directly from the trespass, but from the fact that the trespass was unknown to the plaintiff, and he worked his mine as though defendant had complied with the law in digging up to the line and not over it. The flow of the water from the old abandoned mine of defendant was a continuing nuisance: *Bainbridge on Mines*, 411; *Roberts v. Read*, 16 East, 215; *Gillon v. Boddington*, 1 C. & P. 541; *Sutton v. Clarke*, 6 Taunt. 29; *Lloyd v. Wigney*, 6 Bing. 489; *Bonomi v. Backhouse*, El., B. & EL 622; S. C., H. L. Ca. 503; *Rylands v. Fletcher*, 6 M. R. 129; *Smith v. Kenrick*, 6 M. R. 142; *Smith v. Fletcher*, L. R. 7 Exch. 305; S. C. 3 Eng. R. by Moak, 305; *Crompton v. Lea*, 6 M. R. 179; Angell on Watercourses, 378, § 335; 17 Johns. 306; 7 Pick. 76; 3 Hill, 531; 3 Taunt. 99; 30 Ala. 319; Wood on Nuisances, 12, 121; *Tuthill v. Scott*, 43 Vt. 525; *Beard v. Murphy*, 37 Vt. 104; *Miller v. Laubach*, 47 Pa. St. 155; *Bellows v. Sackett*, 15 Barb. (N. Y.) 96; *Tootle v. Clifton*, 22 Ohio St. 247; *Martin v. Riddle*, 26 Pa. St. 415; *Lammier v. Francis*, 23 Mo. 181; *Earl v. De Hart*, 1 Beasley (N. J.) 280; *Ennor v. Barwell*, 2 Giff. 410; *Kauffmann v. Geismeyer*, 26 Pa. St. 407; *Lattimore v. Davis*, 14 La. 161; *Curtis v. Eastern R. R. Co.*, 14 Allen, 55; *Laney v. Jasper*, 39 Ill. 54; *Adams v.*

Walker, 34 Conn. 446; *Gilman v. Railroad Co.*, 40 Ill. 484; *Sweet v. Cutts*, 50 N. H. 439; *Goodale v. Tuttle*, 29 N. Y. 467; *Hays v. Hinkleman*, 68 Pa. St. 324.

He who has been the author of a nuisance is answerable for all the consequences thereof: Angell on Watercourses, § 402; *Wagner v. Jermanie*, 3 Denio, 206; *Staples v. Spring*, 10 Mass. 72; *Beidelman v. Foulk*, 5 Watts, 308; *Pillsbury v. Moore*, 44 Maine, 156; 3 Blacks. Comm. 220; *Dorman v. Ames*, 12 Minn. 451; *Brown v. Woodworth*, 5 Barb. 550; *Pickard v. Collins*, 23 Barb. 444; *Anderson v. Dickie*, 26 How. Pr. 105; *Smith v. Elliott*, 9 Pa. St. 345; *Fish v. Dodge*, 4 Denio, 311; *Thompson v. Gibson*, 7 M. & W. 456.

But it is said the remedy is trespass and the action is barred by the Statute of Limitations within four years from the date of the trespass, and this without regard to whether plaintiff had knowledge of the trespass or not. The action that is barred in four years is trespass, not case. The damage is continuous, and a cause of action arises in case for each resultant damage: *Harsh v. Butler*, Wright, 99; *Thayer v. Brook*, 17 Ohio, 489; *Railroad Co. v. Greene County*, 31 Ohio St. 338.

The rule we contend for as applicable to this case is stated in Angell on Limitations, § 300. *Hodges v. Hodges*, 5 Met. 205; *Alexander v. Kerr*, 2 Rawle, 83; 3 Rawle, 250; 3 Denio, 306; 1 N. J. 469; 2 N. J. 243; 52 Barb. 257; 3 Blacks. Comm. 220.

When there is a consequential damage, case may be maintained though the original act was a trespass: *Harris v. Ryding*, 5 M. & W. 60; *Roberts v. Read*, 16 East. 215; *Raine v. Alderson*, 4 Bing. (N. C.) 702; *Wells v. Ody*, 1 M. & W. 452; Wood on Nuisance, 116, 119; 30 L. J. C. P. 305; 12 Mod. 518; 32 N. H. 90.

GROSVENOR & VORHES and S. D. HORTON, for defendant in error.

Has the plaintiff, upon the pleadings and the evidence, a right of recovery? We answer no, and for reasons say, 1. More than four years elapsed between the overworking complained of and the bringing of this action. 2. More than four years elapsed after the overflow of the plaintiff's mine, to

as great an extent as it ever did, and before this suit was begun. 3. More than four years elapsed after the full extent of the injury was known to plaintiff before he began this action. 4. The plaintiff did not own the mine to which the injury was done at the time the wrong, if any, was committed, was complete; and his subsequent purchase did not carry with it the right to sue for this alleged injury. 5. There is here no nuisance or continuing cause of action, for the reasons: A. The injury came of a trespass committed on the land of another, to wit: Nahum Ward, by the defendant, and was complete prior to 1862, and before the plaintiff bought the premises; and B. "No one can be charged as a continuing wrongdoer who has not the right, and is not under the duty of terminating that which causes injury": *Kansas Pacific Railway v. Muhlman*, 17 Kansas 224. c. When the plaintiff discovered the flow of water in 1868 it became his duty to "make reasonable efforts to prevent an increase of the injury," and having failed to do so for more than four years, he can not recover for any continuing or increased injury: *Ibid.* The conduct of the defendant, of which the plaintiff complains, was the committing of a trespass, and not the creating or maintaining of a nuisance: *Bainbridge on Mines*, 444, and cases cited. The Statute of Limitations for actions for trespass applies: *Ibid.* "The only ground for excluding or extending the statute would be fraud and mistake. It has been distinctly held at law that fraud (even) will not prevent the statute from running": *Imperial Gas Co. v. London Gas Co.*, 6 Exch. 39; *Blair v. Bromley*, 5 Hare, 542; *Bainbridge on Mines*, 411; 3 B. & Ald. 628; *Nicklin v. Williams*, L. J. N. S. Exch. 335.

WHITE, J.

The decision of this case depends upon what constituted the cause of action against the defendant, and when it accrued. The claim of the plaintiff is, that the cause of action consists of a private nuisance caused by the excavation made by the defendant on lot 1223 when removing the coal, under his lease, from the south half of lot 1222; and that the cause of action is a continuing one, and first accrued when the water

from the abandoned mine flowed over into the mine of the plaintiff. On the other hand, the claim of the defendant is, that the cause of action consisted of the trespass committed in making the excavation, and was completed when the work was done and the mine abandoned. In the first place, it may be observed that this is not a case where the defendant has wrongfully entered upon the lands of the plaintiff and erected and maintained structures thereon. Nor is it a case where structures have been erected and maintained on the lands of the defendant or of another, to the nuisance or injury of the plaintiff's premises. In these cases the wrong may, by the lapse of time, ripen into a right under the Statute of Limitations or by prescription. In speaking to this point, in *Clegg v. Dearden*, 12 Ad. & Ellis, N. S. 601, Lord DENMAN uses the following language: "The gist of the action, as stated in the declaration, is the keeping open and unfilled-up, an aperture and excavation made by the defendant into the plaintiff's mine. By the custom, the defendant was entitled to excavate up to the boundary of his mine without leaving any barrier, and the cause of action, therefore, is the not filling up the excavation made by him on the plaintiff's side of the boundary and within their mine.

It is not, as in the case of *Holmes v. Wilson*, 10 A. & E. 503, a continuing of something wrongfully placed by the defendant upon the premises of the plaintiff; nor is it a continuing of something placed upon the land of a third person to the nuisance of the plaintiff, as in the case of *Thompson v. Gibson*, 7 Mees. & W. 456. There is a legal obligation to discontinue a trespass or remove a nuisance, but no such obligation upon a trespasser to replace what he has pulled down or destroyed upon the land of another, though he is liable in an action of trespass to compensate in damage for the loss sustained. The defendant having made an excavation and aperture in the plaintiff's land was liable to an action of trespass, but no cause of action arises from his omitting to re-enter the plaintiff's land and fill up the excavation. Such an omission is neither a continuation of a trespass, nor a nuisance, nor is it a breach of any legal duty."

The defendant in the present case had no estate or interest in lot 1222 further than the right to mine the coal therefrom.

This he accomplished in 1862, and surrendered the premises. He had no authority from the owner of the fee, nor from Hortou, his immediate lessor, to mine over into lot 1223, and at the time of the flowage of water from the abandoned mine into the mine of the plaintiff, he had for more than five years ceased to have any interest in lot 1222, or any right of entry thereon.

If the claim of the defendant as to what constituted the cause of action is correct, the action clearly can not be maintained. 1. For the reason that, at the time of the commission of the trespass, the plaintiff was not the owner of the land upon which the trespass was committed; and, 2. If he had been such owner the action would be barred by the Statute of Limitations.

There is no distinction in the application of the Statute of Limitations between trespasses underground and upon the surface; nor whether the cause of action is known or unknown to the plaintiff within the time limited by the statute: *Hawk v. Minnich*, 19 Ohio St. 466; *Hunter v. Gibbons*, 1 Hurl. & Nor. 459.

The question, therefore, is, whether the defendant, in addition to the liability for the trespass, is also liable for creating and continuing a nuisance. If he is so liable, a recovery for the trespass would be no bar to subsequent actions for continuing the nuisance.

In Stephen's Commentaries (vol. 3, 499), a private nuisance is defined to be "anything done to the hurt or annoyance of the lands, tenements or hereditaments of another, and not amounting to a trespass."

Here the only thing done by the defendant was the making of the excavation upon the plaintiff's land, which did amount to a trespass.

Plaintiff's counsel claim that the action is brought to recover consequential damages resulting from the wrongful acts of the defendant. Be it so. But with what wrongful acts is the defendant chargeable except those constituting the trespass? We see none. And a recovery for the trespass or the bar of an action brought for it, is a bar to a recovery for the consequences resulting from such trespass. True, this is not the ground, upon which the jury were charged, but the error

in the charge was in favor of the plaintiff, and is no ground for reversal.

Judgment affirmed.

1. Measure of damages in action for injuries from flooding; joint liability of partners: *McKnight v. Ratcliff*, 44 Pa. St., 156; *Post* PARTNER.

2. Damages allowed both to lessor and lessee in case of injury by flooding: *Bannon v. Mitchell*, 2 M. R. 108.

3. Mine flooded on account of barriers being removed: *Id.*; *Marker v. Kenrick*, 2 M. R. 98.

4. A plaintiff can not complain of flooding through an opening made by the trespass of his predecessors by passing their boundaries: *Lomax v. Stott*, 39 L. J. Ch. 834.

5. Injunction to prevent flooding: *Mexborough v. Bower*, 2 M. R. 92; *Thomas Co. v. Allentown Co.*, 28 N. J. Eq. 77; *Post* INSPECTION.

6. Action for flooding mine is local to the county where the mine lies. *Prevost v. Gorrell*, 11 Phila. 263.

See BARRIERS, DRAINAGE.

WEAVER ET AL. V. CONGER ET AL.

(10 California, 234. Supreme Court, 1858.)

- ¹ **Verbiage** and loose allegations do not vitiate a complaint where the facts stated are sufficient to sustain an action.
- ² **General demurrer, where one good count exists.** When a general demurrer to a complaint is interposed, it will not be sustained where there is one good cause of action sufficiently stated.
- ³ **Lis pendens.** A plea of former suit pending between the same parties is not sustained by showing the existence of a suit where no summons had followed the complaint, and no appearance by the defendants.
- ⁴ **Appropriation pending construction of flume.** Parties having the prior right to the waters of a stream by the commencement and partial completion of a ditch and flume have the right to use so much as is necessary to preserve their flume from injury while in process of construction.

Appeal from the District Court of the Fourteenth Judicial District, County of Sierra.

This was an action to recover damages for the diversion of water from, and injury to, the flume and ditch of plaintiffs, and for an injunction.

The complaint in this case occupies a space of fourteen closely written pages of the record, and abounds in verbosity and repetition. It contains four counts:

The first count alleges that on the 5th day of July, 1853, plaintiffs, and those under whom they claim, were the owners, and entitled to the possession, of a certain water right and privilege styled the "Memphis and Orleans Race Company," by location, right, prior possession and occupancy, which said franchise was made, and is in process of construction, to carry water from the middle fork of the Yuba river and its tributaries above the point of location, and the small stream along the line of the route, and also from Cañon creek, a tributary of the south fork of Yuba river, etc. Plaintiffs having so located and possessed, etc., the defendants, on the seventh day of April, 1855, and on divers other days and times between that day and the day of filing this complaint,

¹ *Prescott v. Wells*, 6 M. R. 89; *Campbell v. Taylor*, 2 West C. R. 541.

² *Parrott v. Barney*, 1 Deady, 407.

³ *Primm v. Gray*, 10 Cal. 522.

⁴ *Conger v. Weaver*, 1 M. R. 594.

entered into and upon the same, and forcibly and unlawfully broke, damaged, and injured the said race, ditch and canal, upon which the said waters are to run, thereby injuring and damaging the works and franchise, and rendering the same useless to plaintiffs; and by and through divers logs, trees, stones, gravel, etc., caused by the defendants to flow, fall, etc., upon, over and through the said race; in consequence of which said acts of defendants, the lives of plaintiffs and their employes are greatly endangered, etc.; and to repair the breakage requires great additional work, costs, etc.—to the damage of plaintiffs of \$20,000.

The second count charges that the defendants, on the day and year last aforesaid, and on divers other days, etc., by blasting rocks, uprooting divers logs, stones, and trees, etc., and causing them to fall against said race of plaintiffs, broke and injured the same, and rendered the same useless, etc.—to the damage of plaintiffs of \$20,000.

Third count: Plaintiffs being possessed and entitled to the premises aforesaid, lands and appurtenances, the said defendants on, etc., with force and arms broke and entered several closes of plaintiffs, and then and there forced and broke open and broke to pieces, damaged and spoiled said premises, to wit, said race, etc., and thereby, as well as by forcibly and injuriously obstructing the water flowing therein, and forcibly and injuriously diverting the water accustomed to flow therein, and greatly damaging said premises, etc., defendants subverted, dug up, and removed the said earth, timber, wood, and lumber, and thereby absolutely dammed up and diverted the waters of the south fork of the Middle Yuba river, which was wont to flow in and through the race of plaintiffs—thereby damaging and injuring said plaintiffs, etc., in the sum of \$20,000.

Fourth count: Plaintiffs, on or about the fifteenth day of June, 1853, intending to use the water of the south fork of the Middle Yuba river, above the falls in each of the forks, the waters tributary thereto, and the waters of Cañon creek, for the purpose of a canal for mining purposes, did proceed to claim and locate the right to the use of said waters, and did commence the erection of a flume and ditch, etc. They also aver that they built a steam saw-mill on the line of the work, and

expended over \$100,000. On the first day of May, 1856, the flume was nearly completed from a point about six miles below the upper termination of the flume, to the south fork of the Middle Yuba river, and it became necessary, in the prosecution of the work, to use the waters of said stream. The defendants, well knowing the premises, did on that day, by the erection of dams, divert the waters of said stream, and prevent them from flowing into the flume of plaintiffs, and did also break down and destroy a portion of plaintiffs' flume, and that defendants still continue such obstruction and diversion of said waters, and threaten to continue the same. The complaint prays for an injunction.

The defendants demurred to this complaint, and assigned two causes of demurrer:

1. That the complaint does not state facts sufficient to constitute a cause of action.
2. Misjoinder of action, or several causes of action have been improperly joined in this: that a cause of action for injuries done to the plaintiffs' flume, or ditch, to recover damages, is joined to a cause of action for the purpose of enjoining and restraining the diversion of the water by defendants; and secondly, a cause of action arising from an alleged trespass is joined to a suit in equity for an injunction, the two actions having in point of fact no connection with each other.

The demurrer was overruled, and defendants excepted. Defendants then filed their answer, setting up:

1. Another action pending identical with and the same as the present action.
2. Denying the jurisdiction of the court, of the subject-matter, on the ground that the cause of action occurred in the county of Nevada.

The case was tried before a jury, the plaintiffs had a verdict and judgment, and the defendants appealed.

The additional facts necessary to understand the points decided are set forth in the opinion of the court.

JOHN R. McCONNELL, for appellants.

The demurrer to the complaint ought to have been sustained by the court.

The complaint in this case is the most irregular in form and substance it has ever been our lot to witness. To say that it is incomprehensible is to pay it a compliment. It is worse—it is sheer nonsense.

The first count states that the plaintiffs “were entitled to and in the possession of a certain water right and privilege * * *, called the Memphis and Orleans Race Company, which said franchise and right was made, designed * * *, and is now in progress of construction.”

Who ever heard, before, of a franchise or right being in “progress of construction?”

Again, it states that “the said plaintiffs, having so located and possessed, and being so entitled to the said franchise, right and easement, etc., the defendants, on the seventh day of April, A. D. 1855, in the counties aforesaid * *, *entered into and upon the same*, and then and there, forcibly and unlawfully, broke, damaged and injured the *said race*, ditch and canal.”

What “said ditch” is intended here? The complaint has not before mentioned any ditch, but only a right and franchise. And it says that the defendants “entered into the same;” that is, the same franchise, right and easement. Who ever heard, before, of a man entering a franchise, or mere right and easement, with force and arms?

It then proceeds, at enormous length, to detail special injuries; such as the falling of logs, trees, stones, upon the race or ditch of the plaintiffs, all caused by the defendants.

So incongruous and inconsistent a mass of verbiage never before came under the observation of this court. It more resembles the words and expressions with which the sick man, in his dreams, is apt to clothe the unnatural and rapidly changing images which flit through his brain, than it does a grave and solemn legal pleading. Who can tell what the nature of the injury complained of is?

Is it for an injury to the easement and franchise, or to the ditch or flume, that we are called to answer?

[The counsel argued the insufficiency of the complaint at great length, and referred to the following authorities: *Bigelow v. Gove*, 7 Cal. 133; *McCann v. Sierra Co.*, Id. 121.]

The court erred in awarding judgment of *respondeat ouster* upon the defendants' plea in abatement.

The plea in abatement was to the effect that there was another suit then pending for the same cause of action. We proved our plea by the production of a complaint filed in the clerk's office of the District Court of Nevada County, which is, word for word, the same as the complaint we have just been considering.

The rule is thus stated by Chitty: "The plaintiff can not, after a plea in abatement of the pending of a prior suit, avoid the effect of the plea by discontinuing the first action, which was pending at the time of the plea." (1 Chitty's Pl. 454; 1 Salk. 29; 2 Ld. Ray. 1014.)

In *The Commonwealth v. Churchill*, 5 Mass. 174, the court said that "the merits of a plea, so far as they depend upon the allegation of facts, must be determined by the law and the facts existing at the time when the plea is pleaded. And I do not recollect any case where the plea can be confessed and avoided by a posterior fact done by a party not pleading it."

The question in that case was, whether a nonsuit, in the prior action, could be replied to the plea in abatement, the nonsuit having been rendered after plea pleaded. After determining that "it could not, the court proceeds to say that it is very well known that a man can not bring a second action for the same cause for which he has a prior action pending." And the reason for this rule is stated to be that *Nemo debet bis vexari, si constet curiæ quod sit pro una et eadem causa*.

In a note to this case is cited an ancient case from the Year Books, decided in 39 Henry VI. Defendant pleaded in abatement the pendency of the former suit, etc. Objected to the plea that it ought to have been averred that the prior suit was still pending, but the court said no, that it was sufficient, if it was averred that the first suit was pending when the second was instituted; and that the plea was good, although the first suit was abated before it was pleaded, provided it had not been abated before the bringing of the second suit. This doctrine is recognized in *Sparry's Case*, 5 Cooke, 61, and in a great number of modern English and American cases.

See *Frogg v. Long*, 3 Dana, 151, and *Parker v. Colcord*, 2 N. H. 36.

In New York, the decisions have not been entirely uniform. In *Marston v. Lawrence*, 1 Johns. Cases, 397, the court held that the plaintiff might evade the operation of a plea of former suit pending, by entering a *nil capiat per brevo* in the first, before a replication to the plea. But the more recent decisions of that learned court have conformed to the earlier rule: *Embree v. Hanna*, 5 Johns. 101.

No brief in the record for respondents.

BURNETT, J., delivered the opinion of the court, TERRY, C. J., concurring.

1. The complaint was very loosely drawn, and contains much useless verbiage; but taking it altogether, the facts stated were sufficient to sustain an action. The demurrer was to the whole complaint; and, not being good as to all, was properly overruled. There was no misjoinder of causes of action: *Gates v. Kieff*, 7 Cal. 124. The decision in the case referred to would seem to conflict with the decision in the case of *Bigelow v. Gove*, 7 Cal. 133. The report of this latter case is so full as to give a clear idea of the ground upon which the decision is predicated. Bigelow & Co. alleged, substantially, that they were in possession of certain mining claims, giving the exact metes and bounds; that the defendants entered into and held adverse possession of a portion of these claims, giving an exact description, by metes and bounds, of the portion so held adversely; that defendants had taken away, and were still taking away, from the portion held adversely, large quantities of gold-bearing earth, etc., and that the defendants threatened to continue the trespass, not only upon the portion held adversely, but upon that portion then in possession of plaintiffs, and upon which no trespass had ever been committed. The prayer for the injunction, pending the litigation, was general, and was not restricted to that portion of the claims held adversely by defendants. We thought there was a misjoinder, as the equitable relief asked related to all the claims, and the legal to only a part. Had the plaintiffs sought no remedy against defendant for mere threatened trespass upon premises then

in possession of plaintiffs, and upon which no trespass had ever been committed, the complaint would have been good: *Merced Mining Co. v. Fremont*, 7 Cal. 130.

2. There was no error in the decision of the court upon the plea in abatement. It did not appear that any summons had ever issued upon the complaint, or that there had been any voluntary appearance on the part of the defendants. There was, therefore, no suit pending; and the defendants failed to sustain their defense that there was another suit pending between the same parties, for the same cause of action: Code, § 22.

3. The rights of the parties as to priority of appropriation, were fully settled by this court in the former case between the same parties: 6 Cal. 548. The plaintiffs, having the prior right to the waters of the stream, had the right to use so much of it as was necessary to preserve their flume from injury while in process of construction; otherwise they might never have been able to enjoy the right to which they were entitled.

4. The other assignments of error are not well taken.

We find no error in the judgment of the district court, and the judgment is therefore affirmed.

1. A flume is the property of its builders and they are liable for the taxes on it, notwithstanding the privilege reserved of rejecting it on completion: *Hart v. Plum*, 14 Cal. 148.

2. A flume is in the nature of real estate: *Union Co. v. Murphy's Flat Co.* 3 M. R. 487.

3. Mortgage on a flume covers subsequent improvements and extensions: *Id.*

4. As to different sections of a flume or ditch being one continuous structure, compare *Reynolds v. Hosmer*, 5 M. R. 6, and *South Fork Canal Co. v. Gordon*, 6 Wall. 561.

5. A flume is parcel of its ditch: *Ellison v. Jackson*, 4 M. R. 559.
See DITCH.

COX V. GROSHONG ET AL.

(1 Pinney, 307. Supreme Court of Wisconsin, 1843.)

¹ **Statutory elements of forcible entry and detainer.** The statute provides for two classes of cases: 1. An unlawful and forcible entry and detainer. 2. A lawful and peaceable entry with an unlawful detainer. The complaint must state one of these two causes. A complaint alleging a forcible detainer without alleging a forcible entry is bad.

² **Description.** The complaint must describe the premises with reasonable certainty. A description of the land as "a certain range of lead ore and a strip of land, or piece on each side thereof twenty-five yards on each side running easterly and westerly" etc., is bad for uncertainty.

Practice—Waiver of defects. Proceeding to trial is no waiver of defects in complaint.

Strict construction. In forcible entry and detainer proceedings the provisions of the statute are to be strictly pursued.

Power of justices' courts. Justices' courts are not courts of record, do not proceed according to the course at common law, and are to be confined strictly to the authority given by statute without implications indulged in their favor.

Change of venue. When a cause has been removed from one justice to another, parties after proceeding to trial without objection can not, after trial, assert that it was not sent to the proper justice.

Error to the District Court of Grant County.

In April, 1842, Cox commenced a proceeding in forcible detainer against James Groshong and others, before Samuel Tompkins, a justice of the peace in Grant county. The complainant stated that Cox was "the owner and justly entitled to the possession of the undivided one fourth part of a certain range of lead ore, and a strip or piece of land on each side, running easterly and westerly across the land hereinafter described, and the right of searching and digging for lead ore thereon situate on the land now owned by James Groshong, Jonathan Craig and the said Cox, in section 17, township No. 4 north, of range No. 3 west, in said county of Grant;" "that said James Groshong, Jefferson Groshong and one Stone, did on or about the first day of February, 1842, wrongfully and without lawful authority, enter into and upon the said undivided one fourth part of the said range of lead ore and the said strip of land and the right of searching for lead ore there-

¹ *Voll v. Hollis*, 60 Cal. 569.

² *Klingensmith v. Faulkner*, 84 Ind. 331.

on, and took possession of the same against the right of the complainant, and have from thence hitherto, wrongfully, unlawfully, with force and arms, with a strong hand and a multitude of people, detained the possession thereof from the said complainant."

Process was issued upon the complaint and returned on the 25th of April, on which day, on the application of James Groshong, one of the defendants, the case was adjourned to the 30th of April. It appears that upon this application the justice first adjourned the cause to the 6th of May, but immediately afterward his attention was directed to the statute upon the subject, from which he considered that he had not the power to adjourn the cause for so long a time, when he recalled the parties and witnesses, and notified them that the adjournment was to the 30th of April, and that not more than fifteen minutes had elapsed from the time of his first fixing the adjournment.

On the 30th of April, Jefferson Groshong, one of the defendants, applied for and obtained a change of venue from before Justice Tompkins, who immediately transmitted the cause to Jeremiah Spencer, as the nearest justice qualified to act. Spencer was at that time accidentally in Lancaster, where Tompkins was holding his court, but his residence was not so near as that of other justices in the county. Spencer immediately proceeded with the trial of the cause, and impaneled the same jury that had been summoned before Tompkins. Before the trial commenced, the defendants filed before Justice Spencer an affidavit for a continuance, setting out as grounds, the absence of a material witness, who resided in Illinois; that due diligence had been used to procure him; that James Groshong was then gone for him; and that the defendants believed if an adjournment was granted for seven days the witness could be procured. The motion was overruled and the trial proceeded. The jury rendered a verdict against the defendants, upon which the justice rendered judgment, and awarded a writ of restitution.

The defendants took the case into the district court by writ of *certiorari*, and assigned the following errors in the proceedings before the justices:

1. For want of a legal, full and sufficient complaint in the law; a legal, full and sufficient summons thereon.

2. For that the said Justice Tompkins erred when after he had, on the application of the defendants, adjourned the said action over to the 6th of May, and dismissed the jury, witnesses and parties, in setting aside that continuance and compelling the defendants to answer on the 30th of April.

3. For that the said Justice Tompkins erred when he changed the venue from before himself to Spencer, who was not the nearest justice to the place of holding the court of said Tompkins, or his place of residence, and when there were other justices residing six miles nearer the said Tompkins.

4. That the said Justice Spencer erred when he took cognizance of the case at the place he did, without his docket, and tried it by the same persons whom the said Tompkins had summoned to sit as jurors in the case, without issuing a new process for a jury.

5. For that the said justice showed himself to be a partial justice, from the manner in which he procured the case to be brought before himself on the change of venue from before said Tompkins.

6. For that the said Justice Spencer erred in not giving the defendants a continuance, on their application on affidavit filed.

7. For that the said Justice Spencer erred in not having his docket present, and reducing his proceedings and decisions to writing.

8. For that the jury erred in giving a verdict in favor of the plaintiff, the testimony not having supported his complaint; and the justice erred in rendering judgment on the verdict.

It appears from the return of Justice Spencer that this was the first case which he ever tried; that he had no docket at the time, and did not then reduce the proceedings and decisions to writing; but when he went home, he took down the material parts, and made up his docket as soon as possible.

The district court reversed the judgment of the justice, and the cause was brought into this court by the complainant, Cox, on writ of error, to reverse the judgment of the district court.

BEN. C. EASTMAN, for plaintiff in error.

F. J. DUNN, for defendant in error.

MILLER, J.

This case was commenced under the act to prevent forcible entries and detainers, by George H. Cox against James Groshong, Jefferson Groshong and Stone, before a justice of the peace of Grant county. A verdict and judgment were rendered against the said defendants before the justice, which they removed to the district court of said county by *certiorari*, where the said judgment was reversed, upon which decision of the said district court the said Cox sued out a writ of error.

The examination of the record will require us to consider such of the exceptions filed in the district court to the proceedings before the justice as may be material.

The first exception filed was to the complaint.

The complaint represents that "James Groshong, Jefferson Groshong and one Stone, whose Christian name is unknown to the complainant, did, on or about the first day of February, 1842, wrongfully, and without lawful authority, enter into and upon the said range of lead ore and the said strip of land, and the right of searching and digging for lead ore thereon, and take possession of the same against the right of the said complainant, and have from thence hitherto, wrongfully, unlawfully, forcibly, with force and arms, with strong hand and multitude of people, detained the possession thereof from the said complainant, and still do wrongfully, unlawfully, forcibly, and with strong hand and force and arms, and multitude of people, keep out and detain from said complainant the possession thereof, contrary to the statute and the laws of the said Territory, after demand of possession thereof by complainant," and prayed that summons might issue for a forcible detainer.

By the act upon which this proceeding was founded, any justice shall have authority to inquire by a jury, as well against those who make unlawful and forcible entry into lands, tenements and other possessions, and with a strong hand detain the same, as against those who, having lawful and

peaceable entry into lands, tenements, and other possessions, unlawfully detain the same. By this statute there are two classes of cases made cognizable before the justice: first, an unlawful and forcible entry and detainer; second, a lawful and peaceable entry and an unlawful detainer. The complaint does not come within either class. It charges that the defendants unlawfully and without authority entered the premises, while, if it was desired to proceed for the entry, it should have charged that they unlawfully and forcibly entered. But it was not claimed by complainant to be a summons for an unlawful detainer merely, which comes under the second class, where the entry is lawful and peaceful. From this it will appear that this complaint did not conform to the statute, and for this alone the district court did right in reversing the proceedings before the justice.

This is a proceeding authorized and regulated by statute, and committed to a tribunal whose jurisdiction and authority are created by the statute alone; for these reasons the provisions and directions of the statute must be strictly pursued. Justices' courts are not courts of record and do not proceed according to the course of the common law, and so far as their powers are concerned they are confined strictly to the authority given them by the statute. They can take nothing by implication, but must show the power which they exercise to be expressly given them in every instance: *Thomas v. Robinson*, 3 Wend. 267; *Mills v. Martin*, 19 Johns. 33; *McCarty v. Sherman*, 3 Id. 429; *Borden v. Fitch*, 15 Id. 140; *Andrews v. Montgomery*, 19 Id. 162.

The complaint sets forth "that the said George H. Cox was, on the first day of January last, has been, and still is, the owner of, and justly entitled to the possession of a certain range of lead ore and a strip of land, or piece on each side thereof, twenty-five yards wide on each side, running easterly and westerly across the land hereafter described, and the right of searching and digging for lead ore thereon, in section 17, township No. 4 north, of range No. 3 west, in said Grant county." This would also appear to be too vague and uncertain. It does not describe the land by any marks, descriptions or boundaries, nor does it even refer to its location in the section. It is true that a court would have

a superintending power, which would always be promptly exercised in case a plaintiff should take out a writ of restitution for what he had not recovered; but it is doubtful whether a justice could exercise it. We are aware that it is impossible always to describe a tract of land with so much accuracy as to enable the sheriff to deliver it, without some person to show him, on the ground, the boundaries alluded to in the writ; but nevertheless the premises must be described with reasonable certainty. See on this subject *Burdick v. Norris*, 2 Watts, 28; *Martin v. Martin*, 17 Serg. & R. 431; *Borough of Harrisburgh v. Crangle*, 3 W. & S. 460; *Smith v. Jenks*, 10 Serg. & R. 153; *Fisher v. Larick*, 7 Id. 99.

The remaining exceptions will be disposed of together. The justice is allowed to adjourn, at his discretion, any trial under the act, not exceeding six days. This is a very summary proceeding, which requires the parties to make every effort to procure their testimony and be prepared for the trial. By the act of 1840, section 8, authorizing the removal of causes from one justice to another, after the oath is made by the defendant, the justice shall immediately transmit all the papers in the case to the nearest justice qualified by law to try a cause between the parties in the suit, who shall proceed to hear and determine said cause in such manner as if it originated before him. In this case the parties made no objection to Justice Spencer. The papers were immediately transmitted to him by Justice Tompkins, and the parties, without objecting to his jurisdiction, went to trial on the same day of the removal of the cause. After this it was too late to make the objection that he was not the nearest justice to Justice Tompkins qualified to act, if it could be made at any time.

The trial before Justice Spencer did not waive the errors in the complaint, as we have seen that the jurisdiction of a justice must be made affirmatively to appear, and there are no presumptions in its favor. It was competent to the defendant to raise the objection to it at any stage of the proceedings.

As the complaint is defective, and for this reason the judgment of the justice was correctly reversed by the district court, it is unnecessary to examine the questions raised upon the evidence.

Judgment affirmed with costs.

FUHR V. DEAN ET AL.

(26 Missouri, 116. Supreme Court, 1857.)

Possession to maintain trespass. Naked possession will sustain trespass against a wrongdoer, but will not prevail against a party having title and right of entry.

¹ **Forcible entry by rightful owner.** When one having title and right of entry enters the land by force, the party dispossessed has no sure remedy at common law, but must resort to the statutory remedy by action of forcible entry.

License distinguished from easement. An easement can only be created by deed, but a license may exist in parol; a license creates no estate in the land.

Revocation of license. A license can not be revoked so as to make the acts done under it a trespass, nor can it be revoked to the injury of the licensee without indemnity to the extent of such injury.

Appeal from Washington Circuit Court.

Plaintiff, Frederick Fuhr, set forth in his petition that on the 23d of January, 1854, and for a long time, say two years, prior to that day, he was "legally in possession for the purpose of mining of lead ore, of a lot of ground in the 'Guin Diggings,' in Washington county, about one mile and a half northwest from Potosi, containing one acre, more or less, and set apart from the adjoining ground by stakes," etc.; and, for the purpose of exploring said ground and raising lead ore therefrom, he had, at great expense of time and money, sunk a shaft upon said lot, and cribbed it up securely with timber; that he had run two drifts from about the bottom of said shaft, one sixty, the other fifteen feet in length, which drifts had exposed the lead ore to view, and from which shaft and drifts he could daily raise a large quantity of ore; that on said 23d day of January, 1854, the defendants unlawfully and with force and violence and against the will of plaintiff entered into said shaft, drifts, etc., belonging to said plaintiff, and took possession thereof and expelled the plaintiff therefrom, and are using the said shaft and drifts of plaintiff and raising the lead ore from the said lot and converting it to their own use; and they still have and hold to their own use the lead ore which said plaintiff had dug to the value of thirty-five or forty dol-

¹ *Slaronian Co. v. Perasich*, 1 M. R. 541.

lars. "The said plaintiff states that he has sustained damage by the unlawful acts of the said defendants to the amount of \$1,600; and for the recovery of which sum he brings this suit."

It appeared in evidence that John Dean was the proprietor of a certain tract of land embracing the lot in controversy; that on the 1st of November, 1853, he sold said land to the Missouri Lead Company, of which defendants were the agents; that Fuhr, the plaintiff, was at that time, and had been for some time previously, in possession of the lot mentioned in the petition; that he was engaged in mining for lead ore; that after the said sale, early in January, 1854, the defendants, as agents of said company, gave notice to said Fuhr to quit said lot; that on the 23d day of January, 1854, the defendants entered and forcibly ejected the plaintiff. The court, of its own motion instructed the jury as follows:

"1. The extent as to quantity and the duration in point of time of a 'miner's right,' in the absence of any special arrangement between the miner and the proprietor, is a matter to be determined and regulated by the custom prevailing in that behalf in the particular locality where the right attaches; and where it appears that such right has attached with the consent of the proprietor, then it continues and is obligatory upon all persons claiming under such proprietor until forfeited or otherwise determined by the act and consent of the miner; and if, while such right continues, the proprietor interferes and puts the miner out of his ground, then by such act he becomes a trespasser and is liable in damages for the value of the privilege of which the miner is thus deprived."

The jury rendered a verdict in favor of plaintiff for three hundred dollars.

NOELL, for appellants.

1. The court should have given the instructions asked by the defendants, and erred in giving the first instruction, given at its own instance. The plaintiff had no greater interest than a tenant at will. Defendants had a right to terminate the tenancy at any time upon giving reasonable notice. There was no proof of a custom. Besides, no custom can be sustained in opposition to the established rules of law: R. C.

1845, p. 529; 6 Binn. 417; 1 Wash. C. C. 227; 2 Id. 24; 10 Mass. 29; 3 Watts. 179; 2 Johns. 335; Wright, 573; 1 Hall. 602, 619. The criterion of damages is wrong. The court instructed, first, that a miner's privilege extends to any length of time he chooses, and second, that whatever may be the value of such privilege, he is entitled to recover. This gives to a mere tenant at will the full value of the fee simple by way of damages for terminating, without his consent, his tenancy.

FRISSELL, for respondent.

1. The plaintiff was entitled to a much longer notice to quit. It is conceded that he was a tenant at will. The instructions given were not erroneous.

RICHARDSON, Judge, delivered the opinion of the court.

The action of trespass *quare clausum fregit* may be maintained on a naked possession against a wrongdoer, but it will not prevail against a party who had the title and right of entry. A defendant can justify under the plea of *liberum tenementum*, and can successfully defend the action if he can show superior title and right of possession, although possession is acquired by force: 7 Mon. 574; 1 Bing. 158; 1 John. Cas. 123. The common law affords no civil remedy against a person who, having a right, enters forcibly: *Taunton v. Castar*, 7 Term. 431; but the injured party must appeal to the statutory action of forcible entry and detainer: *Krevet v. Meyer*, 24 Mo. 107. If, then, the plaintiff in this case has no interest in the land, but seeks to recover for the unlawful disturbance of an incorporeal right to dig ore on another's land, he can not recover on the case made in his petition, but must amend.

The first instruction given by the court was erroneous, for it assumes that a custom had been proven regulating the rights of miners; but the bill of exceptions is silent except as to the usage of a particular mine.

The practice of a few persons in a business in which many are engaged will not establish a custom which all persons who are engaged in the same pursuit are presumed to know.

and recognize. A custom which would confer a right so important as that asserted in the instruction—being no less than the right of one person to occupy for the purpose of mining the land of another as long as he pleases, without a deed or other writing—ought at least to be well established by proof. A local custom must be proved on the trial; and we may suppose there was more evidence given on the trial of this case than we see in the record; but it ought to have been preserved in the bill of exceptions, so that it could be ascertained what interest the plaintiff had in the land.

The judgment will be reversed and the cause remanded to be retried; and without intending to anticipate all the questions that may arise on another trial, it may be appropriate to notice some of them that will necessarily be presented. It will be developed by the evidence whether the plaintiff claims the right to mine on the defendant's land as an easement or under a license.

If he claims an easement, it must be established by deed, for, being an incorporeal hereditament, it lies in grant, and can not pass by livery: *Arnold v. Stevens*, 24 Pick. 109. A mere license may exist by parol, and ordinarily is not assignable, and is revocable unless it has been executed and the party has incurred expense on the faith of it, so that he would be injured by its revocation: 3 Kent. 452; *Pierpont v. Bernard*, 2 Selden, 279; *Wood v. Leadbitter*, 13 Mees. & Wels. 838. In *Cook v. Stearns*, 11 Mass. 536, the court held that a license is technically an authority to do something on the land of another without passing an estate in the land; and a license to do a particular act does not invade the policy of the law that requires conveyances of title or interest in land to be in writing, for it may amount to nothing more than an excuse for an act which would otherwise be a trespass; but an easement can not be acquired without a deed, or prescription, which implies one. SAVAGE, C. J., in *Munford v. Whitney*, 15 Wend. 380, after reviewing the authorities, observes:

"They all agree in this, that any permanent interest in the land itself can not be transferred except by writing. Much of the discrepancy may have arisen from the different ideas attached to the word license. If we understand it as Chancellor Kent defines it, it seems to me there can be no difficulty.

It is an authority to do a particular act upon another's land; is founded in personal confidence, and is not assignable. For example, A agrees with B that B may hunt or fish on his, A's, land; A thereby gives B a license for that purpose. This gives B no interest in the land. He can not authorize any other person to go upon the land. It is a personal privilege granted to B alone. If, after A has given his consent, and before B has entered upon his land, A changes his mind, he has a right to do so, and forbid B from entering upon his land for the specified purpose. The license is thus far executory, and may be revoked at pleasure. If B afterward enters, he is a trespasser. If, however, B enters before any revocation of the license, the license is then executed; and it is not competent for A to revoke it and make B a trespasser. This doctrine is applicable only to the temporary occupation of land, and confers no right nor interest in the land."

Though it is difficult often to determine between an easement and a license, it seems to be settled that the right to enter and remain on another's land for a certain time or indefinitely, at the pleasure of the party claiming the privilege, is an interest in the land, which can only be created by deed.

A license can not be countermanded, after it has been executed, so as to permit acts done under it to be treated as trespasses; and though sometimes it may not be easy to ascertain the point of time at which a parol license may be revoked, when it is no longer executory and the licensee has expended money on the faith of it, and it is in the enjoyment of the privilege connected with it, yet there must be a time at which it is revocable, otherwise it would create a permanent interest in land.

It may be, however, that when acts have been performed upon the faith of a license, the party giving it may be equitably estopped from revoking it to the injury of the other party, but the estoppel will be limited by the injury it is invoked to prevent; as if A gives B the privilege of passing over his land, it may be countermanded at any time and no harm will be done, for the parties will stand after the revocation where they were before; but if the license is that B may build a house on A's land, and B, on the faith of the license, erects the house, he might have the right of removing it, and A

would perhaps be denied the power of revocation until B has been indemnified by the use of the property for the money he had expended on it.

The other judges concurring, the judgment will be reversed, and the cause remanded.

FREMONT V. CRIPPEN.

(10 California, 212. Supreme Court, 1858.)

¹ Writ of possession against acquitted defendants. Plaintiff sued A, B and C for forcible entry of a mine; the verdict was guilty as to A and B, not guilty as to C. *Held*, that such verdict was conclusive of the fact that plaintiff was rightfully in possession and had been wrongfully dispossessed by certain parties; that as to C, it merely showed that he did not participate in the trespass, and that the writ justified the dispossession of all the defendants.

Mandamus to compel sheriff to execute writ. In such a case a peremptory mandamus will issue to compel the execution of the writ against parties claiming under the acquitted defendant.

Existence of collateral remedies will not prevent mandamus. To supersede the award of mandamus a party must have not only a specific legal remedy, but one competent to afford speedy relief and that possession which is the object of the action of forcible detainer; no action on the sheriff's bond, or criminal prosecution, or action on the case for breach of duty, will give such relief or prevent the ordering of a mandamus.

Appeal from the District Court of the Thirteenth Judicial District, County of Mariposa.

Application to the court below for a writ of *mandamus*.

It appears that Fremont commenced an action against a corporation called the Merced Mining Company, and Smyth Clark and John Vandewater, for a forcible entry upon "the upper drift of a shaft of a certain mine, called the Josephine Vein," in Mariposa county.

The jury rendered a verdict of guilty as to Clark and Vandewater, and not guilty as to the corporation. Judgment was rendered upon the verdict, awarding possession to plaintiff.

¹ As to what parties may be dispossessed see *Fogarty v. Sparks*, 22 Cal. 143; *Sampson v. Ohleyer*, Id. 207; *Mayne v. Jones*, 34 Id. 483.

iff, and writ of restitution issued, which was placed in the hands of defendant for execution.

This process the sheriff refused to execute, alleging as an excuse, *first*, that the mine was in the possession of neither Clark nor Vandewater, but certain persons claiming to hold under the Merced Mining Company, in whose favor a verdict of not guilty was returned; *second*, that since the entry of the judgment the tunnel described had been deepened, and that, under the writ, he could only put plaintiff in possession of such portion as had been excavated at the time judgment was recovered.

The judge, below, on application of plaintiff, awarded a peremptory *mandamus* against the officer, and from this order an appeal is taken.

RICHARD H. DALY, for appellant.

PERLEY, for respondent.

The return of the sheriff sets out two facts as the reason why he does not execute the writ:

1. That Clark and Vandewater were not in possession, but other parties claiming under the Merced Mining Company, who were found not guilty.

2. That the shaft had been widened and deepened since the judgment of restitution, and he refused to give any possession except of what was recovered.

The first affords no legal excuse or justification, and the second is frivolous, nonsensical and absurd.

Returns to writs of *mandamus* are of three kinds:

1. Traverses.
2. Special returns of confession and avoidance.
3. A statement in the nature of a demurrer to the writ.

The return in this case belongs to the second class, but it is wholly uncertain and defective, both in form and in substance.

"It is incumbent on the defendant, in framing his return, to set out the whole legal facts of his case *in extenso*, in order that the court may have the means of judging of the legality of the excuse. A special return must not only be good in substance, but must be expressed in apt words; or, in other

words, the language and rules of pleading in personal actions should be adopted." (Tapping on Mandamus, 394.)

As to the force and effect of the writ of restitution.

This writ commands the sheriff to do two things :

1. To turn out Clark and Vandewater.
2. To give plaintiff peaceable restitution of the property described in the writ.

The sheriff returns that he did not find Clark and Vandewater in possession, but other persons claiming under the Merced Mining Company, who were found not guilty, and therefore he refuses to turn them out and give plaintiff restitution.

This return is inveigling, uncertain, inferential and argumentative.

The sheriff had a writ emanating from a court of competent jurisdiction, commanding him to give plaintiff restitution. There was nothing in it about the Merced Mining Company. Whether they were found guilty or not guilty, was none of his business. He refuses to execute the writ, but goes behind it, and looks into a judgment with which he had nothing to do. He then constitutes himself an appellate court, and determines the legal force and effect of the verdict not guilty, and his conclusion is that this verdict found, not only that the Merced Mining Company were in peaceable and quiet possession of the property, but that they were entitled to the possession as against Fremont and all the world.

It is useless to argue to this court that nothing was found in favor of the company by the verdict of not guilty, as far as the property was concerned.

This verdict simply acquitted them of the forcible entry. The verdict showed conclusively that a forcible entry had been committed by Clark and Vandewater, two of the defendants, but not by the company.

The verdict showed that Fremont was peaceably in the actual possession at the time this forcible entry was committed, otherwise Clark and Vandewater could not have turned him out, and could not have been found guilty.

Now, I contend that the writ of restitution puts everybody out of possession holding adversely to the plaintiff.

The sheriff can not stop to determine whether a party is lawfully in possession or not. He must execute the writ.

Its command is positive and peremptory to cause the plaintiff to have peaceable restitution of the premises.

The sheriff is amply protected by a process valid on its face, and if he fears personal liability, he can call on the plaintiff for indemnity.

If the sheriff should, under the writ, turn out anybody having a right to remain there, the remedy is by action.

"After judgment against A, in an indictment for forcible entry, under the writ of restitution, the sheriff may turn out B, whom A has put in possession": *State v. Gilbert*, 2 Bay, 355.

It may be argued that this is not a proper case for a *mandamus*; that there is another remedy by action against the sheriff on his official bond.

Section 468, Practice Act, provides that the writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law.

Section 467 provides that the writ may be issued to any tribunal, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station.

In this case, the execution of the writ of restitution was a duty directly enjoined by law on the sheriff, and immediately resulting from his office, trust and station.

There is no other plain, speedy or adequate remedy.

TERRY, C. J., after stating the facts, delivered the opinion of the court, BURNETT, J., and FIELD, J., concurring.

The refusal of the sheriff to execute the writ seems to be based on the hypothesis that the verdict of the jury was equivalent to a finding that the Merced Mining Company were in the lawful possession of the premises at the time of the trial.

The verdict is conclusive that the plaintiff was peaceably in actual possession of the premises at the time of the entry; that unlawful and forcible entry on his possession was made by defendants Clark and Vandewater, and that the Merced Mining Company did not participate in the trespass. The peaceable and actual possession of the plaintiff is incompatible with the lawful possession of another, and the verdict is

conclusive against the possession of the Merced Mining Company.

The question then arises, whether, under the writ, the sheriff is authorized to dispossess parties who are strangers to the proceeding.

The object of the statute concerning forcible entries, is to afford parties, whose possession is disturbed by force and violence, a summary remedy.

This object would be entirely defeated if a defendant, after judgment, could, by transferring the possession to a stranger, prevent the execution of the writ.

"If it were once permitted for a defendant, against whom there was a judgment on a forcible entry and detainer, to put in a third person, or for a third person to enter afterward, with a view of again putting a plaintiff's title to the rack, such third person might again, in his turn, after judgment against him, put another in possession, or permit him to enter; so that there might be prosecutions without end, and the object of regaining possession by the plaintiff would be as far off as at the commencement of his first remedy to regain his possession, to the utter subversion of all justice": *State v. Gilbert*, 2 Bay, 355.

The second reason assigned for the refusal is frivolous, and requires no notice at our hands.

There being no error in the record, the judgment is affirmed.

On petition for rehearing, TERRY, C. J., delivered the following opinion, FIELD, J., concurring:

An application is made for a rehearing in this cause, one of the grounds being that the defendant had no opportunity to be heard before the decision of the court was rendered.

In the record, there is a stipulation, signed by the attorneys of record for both parties, agreeing that "the cause be submitted for decision to the Supreme Court on written argument, within ten days from the date, and that if either party fails to file said argument within said time, that the court may proceed to decide the case immediately on the record and brief of either party that may be then on file."

This stipulation was dated September 15, 1858, was filed in this court on the 19th, and the decision of the court was rendered ten days afterward.

The nature of the case, it being a proceeding against a public officer to compel the performance of an official duty, the anxiety of the parties to obtain a speedy decision, and the fact that it was represented to the court that the public peace would be endangered by delay, were, by the court, deemed sufficient reasons for taking up the record out of its order on the calendar.

If the appellant has not been fully heard, the fault lies with himself, as he had fourteen days between the date of the stipulation and the decision of the case in which to file a brief, or to apply for an extension of time.

The conclusion of the court was arrived at after proper deliberation, was unanimous, and the argument of the counsel, in his application for a rehearing, has failed to raise a doubt as to its correctness.

The only point made in the petition which was decided in the opinion is, that plaintiff's remedy was by action on the sheriff's bond, and not by *mandamus*.

This objection is not well taken; the statute provides that a *mandamus* may issue "to any inferior tribunal, board, or person, to *compel* the performance of an act which the law specially enjoins as a *duty* resulting from an office, trust or station," and shall issue in all cases when there is not a *plain, speedy, and adequate* remedy in the ordinary course of law.

Now, the execution of final process is specially enjoined by law on defendant as a duty resulting from his office of sheriff, and in our opinion the plaintiff in this case has no plain, speedy, or adequate remedy in ordinary course of law. It is true, he might sue defendant on his bond for the damages resulting from the non-performance of his duty, but the possession of the property which has been adjudged to him can only be obtained by the present process, and is the only adequate remedy.

To supersede the remedy by *mandamus*, a party must not only have a specific adequate legal remedy, but one competent to afford relief upon the very subject-matter of his application.

Neither a remedy by criminal prosecution (2 B. & A. 646), nor by action on the case for neglect of duty, will supersede that by *mandamus*, since it can not compel a specific act to be

done, and is, therefore, not equally convenient, beneficial, and effectual: 23 Wend. 461.

Rehearing denied.

HENDERSON V. ALLEN ET AL.

(23 California, 519. Supreme Court, 1863.)

¹Title in controversy. It is doubtful whether in a pure action of forcible entry and detainer the title can be involved; but if it may be, and the cause arise before a justice of the peace, the statute allowing removal to the district court of cases raising questions of title, becomes applicable.

Pleading in justices' courts. An answer denying generally the allegations of a complaint is sufficient in an action before a justice of the peace.

Prospecting contract does not create relation of landlord and tenant.

An agreement by which a party agrees with the claimant of public land to prospect it for coal, the coal when found to be worked on shares, constitutes the parties to the contract tenants in common or mining partners and does not constitute the relation of landlord and tenant. The action of unlawful detainer will not therefore lie against the prospecting party.

Appeal from the District Court, Seventh Judicial District, Contra Costa County.

The facts are stated in the opinion of the court.

G. F. & WM. H. SHARP, for appellants.

M. S. CHASE, for respondents.

CROCKER, J., delivered the opinion of the court, NORTON, J., concurring.

This action was commenced before a justice of the peace, the plaintiff claiming to be the owner of a certain tract of land containing a coal mine, which he had leased to the defendant, Clark, under whom the other defendants claimed, and put him into possession, under an agreement by which the plaintiff was to have one third of the coal taken from the mine in opening the same. The complaint avers that the term of the lease had expired, and the defendants refused to surrender

¹ *Lachman v. Barnett*, 16 Nev. 154; *Stuckey v. Carleton*, 66 Ga. 215.

the possession, and prays for restitution. The defendants, Allen and Lander, filed an answer, denying the allegations of the complaint, and set up that they were the owners of the premises; that the title was necessarily involved, and prayed that the cause be certified to the district court for trial. The cause was afterward so transferred, and at the trial, in the district court, a judgment of nonsuit was rendered against the plaintiff; from which, and from a motion refusing a new trial, he takes this appeal.

The first point we will notice is, that the district court had no jurisdiction of the action, it having been commenced before a justice of the peace. It is doubtful whether, in an action purely for a forcible entry or detainer, the title can be involved in the controversy, the question being one relating solely to the possession. This court seems to have held both ways upon this point: *Larus v. Gaskins*, 5 Cal. 507; *Dickinson v. Maguire*, 9 Id. 50. But where the action is against a tenant and others for unlawfully holding over lands after the termination of a lease, and other actions not founded upon a forcible entry or detainer, the title may properly become involved, in some cases, and the statute authorizing their removal to the district court would be applicable: *Cullen v. Langridge*, 17 Cal. 67. This point is therefore overruled.

It is objected that the plaintiff was entitled to a judgment in the justice's court, for want of a sufficient answer. The answers deny generally the allegations of the complaint, and this was sufficient in an action before a justice of the peace, where the strict rules of pleading do not apply. Secs. 19 and 20 of the act under which this action was brought fully provide for such cases, the latter providing that "all matters of excuse, justification, or avoidance of the allegations of the complaint, may be given in evidence under the answer" The objection that the defendants had no right to file an amended answer in the district court is not well taken.

It is further urged that the court erred in granting a nonsuit. It appears that the land in controversy is public land; that the plaintiff claimed to have entered under the Possessory Act of this State; that he made a verbal agreement with the defendants, by which they were to prosecute the proper

work thereon until they struck coal, to receive two thirds of the claim until they struck coal on a particular lode or seam, and after that the work was to be prosecuted by the plaintiff and defendants jointly, the plaintiff to pay one third of the expenses and the defendants two thirds; that the coal was not struck at the point designated. The plaintiff was also to build a house upon the claim and hold possession thereof for the defendants, which he failed to do. Nor had the plaintiff performed the acts required by the Possessory Law to entitle him to hold or claim the land under that act. It appears that the defendants afterward located the tract, under the Possessory Act. Under these facts the nonsuit was properly granted, and the plaintiff must seek his remedy, if any he has, under a different kind of action. The relation which existed between the plaintiff and the defendants was not that of landlord and tenant, but that of tenants in common, or partners, in the nature of a mining partnership; and therefore this kind of action will not lie. It has been repeatedly held, that even the letting of land to a person to cultivate—the crops to be divided between the owner and the cropper, in certain proportions—did not amount to a lease, or create the relation of landlord and tenant between them. In such case, the owner is held to be in possession of the land, and the parties are joint tenants in the crop: *Bradish v. Schenck*, 8 Johns. 151; *Foots v. Colvin*, 3 Id. 216; *DeMott v. Hageman*, 8 Cow. 220; *Putnam v. Wise*, 1 Hill. 234. In such case, it is an agreement to work on shares, and not a lease to render rent; for which an action will lie against the tenant: *Caswell v. Districh*, 15 Wend. 379. So in the present case, the agreement is to work the mine on shares, and not a lease of the land to render rent; and this kind of action will not therefore lie.

The judgment is affirmed.

LAIRD ET AL. V. WATERFORD ET AL.

(50 California, 315. Supreme Court, 1875.)

- ¹ **Possession essential to recovery—Mine remaining unworked.** A party who has worked a mining claim, run tunnels and sunk shafts for prospecting purposes, but who has quit work and done nothing for some months except to leave his tools on the premises, and has never marked his boundaries—has not such possession as is essential to maintain forcible entry.
- ² **Entry on such claim by second prospector.** And a second party peaceably entering upon such premises is not guilty of a forcible entry, nor does his refusal to yield possession on demand make him guilty of a forcible detainer.

Appeal from the County Court of the County of Stanislaus.

The complaint contained three counts: one for an unlawful entry upon a tract of mining claims, and a refusal to deliver possession of the same after demand, another for a forcible entry on the claims, and unlawfully keeping possession of the same, and a third for keeping possession of the claims with a strong hand, and by menaces and threats of violence.

The evidence on behalf of the plaintiffs tended to show that, in 1863, the plaintiffs commenced running tunnels for prospecting purposes, in a spur of Red Mountain, in the gold regions in Stanislaus county, and built a log cabin near by, which they occupied while at work. That the plaintiffs continued prospecting, at different times, till about November, 1873, when they ceased work, and did not again occupy the claim or cabin, although their tools remained in the cabin. The defendants, in May, 1874, entered upon and claimed a portion of the ground upon which the plaintiffs had prospected, and also repaired and occupied the plaintiff's cabin. Prior to the entry of the defendants, the plaintiffs had not marked off or designated by boundaries the ground claimed by them. The plaintiffs, in October, 1874, caused a survey to be made of about six hundred acres, including the ground claimed by the defendants. The land was public land. More than five days before the commencement of this action, the plaintiffs served on the defendants a written demand for the surrender

¹ *Morenhaut v. Wilson*, 1 M. R. 53.

² *Sweet v. Webber*, 7 Colo. —.

of the tract described in the complaint, but the defendants failed to comply with the demand. The action was commenced on the 5th day of November, 1874. When the plaintiffs rested, the defendants moved the court for a nonsuit, on the following grounds:

1. That there is no evidence showing that the plaintiffs, or any of them, were in the actual, peaceable or exclusive possession of any of the land mentioned and described in the complaint, at the time defendants entered thereon

2. There is no evidence tending to show any forcible or unlawful entry, or any forcible or unlawful detainer.

The court denied the motion, and the defendants excepted.

The plaintiffs obtained a verdict and judgment. The defendants appealed from the judgment and from an order denying a new trial.

H. F. CRANE, for the appellants.

J. J. SCRIVNER and H. A. GEHR, for the respondents.

By the COURT:

The motion of defendants for a nonsuit ought to have been granted. The plaintiffs failed to prove such a possession of the demanded premises as entitled them to maintain the action, under the second subdivision of section 1160 of the Code of Civil Procedure, and there was no proof of a forcible entry or detainer.

Judgment and order reversed, and cause remanded with an order to the court below to dismiss the action.

Remittitur forthwith.

MILLER V. SPARKS.

(4 Colorado, 303. Supreme Court, 1878.)

Lessor's right of re-entry—Demand of rent. A lessor of a mine before he exercises the right of re-entry reserved for breach of covenant to pay rent, must make an actual demand of the amount of rent due, in strict compliance with the requirements of the common law.

Necessary averments implied from record. In an action of forcible entry and detainer, it is necessary that the complaint should show that the defendant entered upon the possession of the plaintiff; but that which appears by necessary implication from the record is the same as if expressly averred.

Sufficiency of complaint. A complaint which alleges a forcible detainer, and also alleges a demand for possession when no such demand was necessary, does not, therefore, state two causes of action in the same count.

Judgment upon certiorari under statute. Under the statute, by which a cause was taken to the District Court of Gilpin County, from a justice's court by *certiorari*, it is in the power of the court to render an independent judgment, to review and revise the whole case, and give such a judgment as the justice should have given.

Appeal from the District Court of Gilpin County.

Forcible entry and detainer. Sparks, the appellee, filed his complaint before a justice of the peace of Gilpin county, substantially as follows:

That "on the 27th day of August, 1875, at said county, Alexander C. Newton and Loring P. Miller were the owners of, and in the possession of, the following described lode, mine and mining claim, to wit: the east eight hundred feet of the Grand Army lode, situate in Eureka mining district, in said county, being the east eight hundred feet of that certain claim on the Grand Army lode, sixteen hundred feet in length, patented to said Loring P. Miller and George Newton, by the government of the United States. Also a certain shaft on said lode just outside of the surface boundaries of said Grand Army lode, as described in said patent, being same shaft sunk by said Miller and one George Wood; that on said 27th day of August, 1875, Alexander C. Newton and Loring P. Miller made and executed and delivered to said Ozias T. Sparks, their certain lease in writing, signed and sealed by said Miller & Newton and said Sparks, whereby said Miller & Newton conveyed, demised, leased and let unto said Sparks said above described premises, being said eight hundred feet on said lode, and said shaft, for and during the term of three years from the said 27th day of August, 1875; that said Sparks then and there, to wit, on said 27th day of August, 1875, entered upon and into the peaceable possession of said shaft and said eight hundred feet on said lode, was then, and from thence until the 1st day of March, 1876, in the quiet,

peaceable and undisputed possession of said premises, and was during all that time working and mining said premises, according to and under, and by virtue of the said lease, so executed to him by said Newton & Miller; that on the 1st day of September, 1875, said Sparks employed said Loring P. Miller and one George Newton to work for him in sinking a shaft and mining and hoisting ore on said mine, and said Miller and said George Newton worked for him from said 1st day of September, 1875, up to the 1st day of March, 1876, as his servants and employes, part of the time, and part of the time said Miller was working upon a contract with said Sparks for sinking the shaft; that on the 29th day of February, 1876, said Sparks was at the said mine as usual during the day, and went home at night, leaving one shift at work upon the mine, among whom was the said Miller; that the said Sparks returned to said mine at the usual hour on the morning of the 1st of March, between seven and eight o'clock, and found the door of the shaft house on said mine closed, and locked upon the inside, and the front door also locked upon the outside; that said Miller and George Newton were upon the inside; that said Sparks called upon them to open the door and admit him to the said shaft house and premises; that they refused to do so, and the said Miller said to complainant that he had possession of said premises and was running it, and that if complainant came in the said shaft house he would get hurt; that complainant then attempted to get in, and reached inside and tried to open the door, whereupon said Miller struck complainant on the hand with an axe and wounded and injured the said complainant, and by such force, violence and threats of violence, did then and there, to wit, on said 1st day of March, 1876, turn said complainant Sparks out of possession of said premises, theretofore so possessed by him as aforesaid, and did then and there by such force, violence and threats, detain and hold possession of said premises, and with said Alexander C. Newton has ever since unlawfully detained said premises against the right of said complainant, although the said Sparks has since the said entry of the said Miller and Alexander C. Newton, to wit, on the 3d day of March, 1876, made a demand, in writing, of the said Loring P. Miller and Alexander C. Newton, for the possession of said premises, and

mine and shaft thereon, a copy of which demand, in writing, is hereto attached and made a part hereof, marked 'A.' Yet they, the said Loring P. Miller and Alexander C. Newton, now unlawfully detain and hold the possession of said premises and mine, and against the right of said complainant; therefore he prays that the said Loring P. Miller and Alexander C. Newton may be summoned to answer this complaint, as is by statute in such cases made and provided."

Second count substantially the same as the foregoing, except as to the allegation of the entry, which was as follows:

"That on said first day of March, 1876, said Loring P. Miller and Geo. Newton, said Geo. Newton acting for Alexander C. Newton, unlawfully and forcibly entered upon said mine and premises, and forcibly detained the same from the said Sparks, and said Miller and Alexander C. Newton still unlawfully detain said premises, although said Ozias T. Sparks is lawfully entitled to the possession thereof, and has since said forcible entry, and before bringing this suit, made demand in writing of said Alexander C. Newton and Miller, for possession thereof."

The separate answer of Miller was as follows:

"Loring P. Miller, defendant in this suit, by way of an answer to the complaint in this case, by this, his amended answer to the first count in said complaint, says, he admits the making of the lease, together with the said Newton, and delivering the same to said Sparks, as in said first count of the complaint is alleged; admits that Sparks took possession of said premises and worked the same for the time, in the manner set forth in said count; admits that when Sparks came there on the morning of the first of March, 1876, the doors of the shaft house or building were closed and fastened as is charged and set forth in said first count; admits that he and George Newton were in the shaft house on the morning of the first day of March, 1876, when said Sparks came to the said building or shaft house and demanded the door to be opened and his admittance therein; admits he denied admittance to said Sparks at that time into said building and shaft house, but he denies that he said to said Sparks that he (Miller) would hurt him (Sparks) if he came into said shaft house or mine, and he denies that he struck said Sparks on the hands

with an axe, or with anything else, or that he touched him in any way, or used any threats of violence or injury to said Sparks, or that he used any words or actions as have a natural tendency to excite fears or apprehension of danger toward said Sparks, or that he frightened said Sparks out of the possession of said premises, as in the said complaint is alleged; denies that he alone, or together with Alexander C. Newton, has kept or detained the possession from said Sparks of said premises, or any part thereof, by threats, or by force or violence, or in any other way, from the said first day of March, 1876, until the commencement of this suit, or for any part or portion of said time except as hereinafter stated; and he denies that he has, since the first day of March, 1876, either by himself or together with Alexander C. Newton, by force, violence or threats, kept or detained or held possession of said premises, or any part thereof, against the rights of said Sparks, as in said first count is alleged; admits that said Sparks served a paper on him demanding the possession of said premises on the third day of March, 1876, but whether said paper or notice was sufficient in law for the purpose intended he neither admits or denies, but will demand strict proof of the same at the trial; avers he did not have possession of said premises or any part thereof at the time said notice was served upon him, and could not give possession thereof, and has not had possession since that time.

“And this defendant, further answering the first count of said complaint, says, that the lease mentioned and set forth therein among other things provides that said Sparks shall work and mine said premises in a good and workmanlike manner, including timbering said mine whenever or wherever necessary; that said Sparks should pay to said Newton and this respondent, as rent therefor, ten per cent. of the gross proceeds of said mine, payable whenever and as often as any ore shall be crushed, or treated, or sold, and the proceeds thereof returned therefrom; said rent to be paid to said Newton and this respondent, or deposited to their credit in the Rocky Mountain National Bank, in Central City, in said Gilpin county, and in case said rent shall not be paid or deposited at the time and in the manner specified in said lease, the said Newton and this respondent might re-enter and take posses-

sion of said mine and premises, and every part thereof, and occupy and enjoy the same as of their first and former estate, and the said Sparks be put out of said premises, and the said Newton and this respondent have the right to use such force as may be necessary in so doing, and all rights of the said Sparks under said lease shall cease and absolutely determine. That said Sparks, on or about November, 1875, had some two or three cords of ore mined and taken from said premises, and crushed and reduced, and received therefor at least one hundred and twenty dollars, ten per cent. of the gross proceeds of which, under the terms of said lease, belonged to and should have been paid to said Newton and this respondent, by said Sparks, as rent, but how much more rent is due them from said Sparks he does not know and can not state, but said Sparks did not pay or offer to pay said Newton and this respondent, or either of them, any part thereof. Neither did he deposit the said rent, or any part thereof, in the Rocky Mountain National Bank, at Central City, to the credit of said Newton and this respondent, or to the credit of either of them, wherefore, upon the morning of the first day of March, 1876, the defendant went upon the said premises and into the shaft house and building, peaceably and without force, and when no person or persons were in or upon the same, and took quiet, peaceable and lawful possession of said shaft house and mine as aforesaid, possessed by said Sparks, as he lawfully might do under the terms of said lease, because of the forfeiture of said lease on the part of said Sparks, for the neglect and failure to pay the rent then and there due, under the same as aforesaid, and for said Sparks' neglect and failure to work and mine said premises in a good and workmanlike manner, in this, in not timbering said mine whenever and wherever necessary; avers that when he took possession of said premises, as aforesaid, the said sum of twelve dollars and over for the rent had been due this defendant and Alexander C. Newton since the first day of December, 1875. And this defendant, further answering, says: That after he had taken possession of said premises as aforesaid, on the morning of March 1, 1876, he immediately turned the said premises and every part and portion thereof, together with the appurtenances thereon, over to James C. Fagan; avers that he has not had the

possession of said premises since the said first day of March, 1876, and then only for a very short time, and he denies that he alone, or together with said A. C. Newton, is guilty of forcibly entering into the possession of any part or portion of the premises mentioned and described in the said first count, on the first day of March, 1876, or at any other time, and dispossessing said Sparks, and by force, violence and threats detained and held possession of said premises against the right of said Sparks, as in said count is alleged, and this he is ready to verify, wherefore he prays judgment."

The answer to the second count was substantially the same as the foregoing, denying the entry of respondent with George Newton, as alleged in the second count. Sparks demurred; the demurrer was sustained, and Miller elected to stand by his answer, and final judgment was thereupon entered on the demurrer. The cause coming on to be heard on the complaint, and the answer of Newton, the court, after hearing the evidence, gave judgment in favor of the plaintiff. Upon the review of the cause on *certiorari* in the district court, the judgment as to Miller was affirmed, and as to Newton reversed, and a writ of possession awarded the plaintiff. Miller prayed an appeal to this court.

WM. R. GORSLINE and L. C. ROCKWELL, for appellant.

BELFORD & REED, for appellee.

ELBERT, J.

A lessor, before he exercises the right of re-entry reserved for breach of covenant to pay rent, must make an actual demand of the amount of rent due, in strict compliance with the requirements of the common law.

Whenever a forfeiture for the non-payment of rent is to be established, it is necessary to prove such a demand: Taylor's Landlord and Tenant, §§ 297, 298; *Chadwick v. Parker*, 44 Ill. 326; *Smith v. Whitbeck et al.*, 13 Ohio St. 471; *Jackson v. Harrison*, 17 Johns. 66.

The defendant Miller could not avail himself of the right to re-enter the leased premises under the terms of the lease, without having first made a demand of the rent due, and, in

the absence of any allegation that such a demand was made, the matter set up in the answer did not constitute a defense.

The demurrer to the answer was properly sustained.

It is insisted, however, that the complaint is fatally defective, and that the demurrer must be carried back to the first defective pleading.

The objections urged against the complaint are:

1st. That it does not show that the defendant entered upon the possession of the plaintiff.

2d. That two causes of action are stated in one and the same count.

Undoubtedly it is necessary, in an action of forcible entry and detainer, to show in the complaint that the defendant entered upon the possession of the plaintiff.

The allegation in the complaint in the case at bar, "that Miller * * * by such force, violence and threats of violence, did then and there, to wit, on said first day of March, 1876, turn said complainant, Sparks, out of possession of said premises," is in substance an averment that the complainant was in possession of the premises at that date, and, taken in connection with the other averments of the complainant, satisfies the rule above stated: *Spurck v. Forsyth*, 40 Ill. 440; *Lee v. Stiles*, 21 Conn. 504.

"That which is apparent to the court and appears from a necessary implication out of the record is the same as if it were expressly averred": *State v. Nichols*, 8 Conn. 499.

Whether the facts stated in the complaint constitute a forcible entry or not is immaterial, as the action lies where the possession is maintained with force and strong hand, although the entry may have been peaceable: R. S., p. 332.

The allegations of the complaint show fully and clearly a forcible detainer under section two of the act. That the complaint alleges a demand of possession, when no demand was necessary, does not affect its sufficiency, or render it obnoxious to the objection that two causes of action are stated in one and the same count.

For these reasons the objections to the complaint are not regarded as well taken.

Section seven of the act concerning *certiorari* to justices and probate courts, provides that the district court "shall give

judgment in the cause as the right of the matter may appear * * * and may affirm or reverse the judgment in whole or in part, or may render such judgment as the facts and law warrant."

Under the broad provisions of this section, we have no doubt of the power of the district court to render an independent judgment; to review and revise the whole case, and give such judgment as the justice should have given: *Berry v. Lowe*, 10 Mich. 9.

In the case at bar, the district court, upon the hearing, entered an independent judgment to the effect that the complainant, Sparks, recover the possession of the premises in controversy; that he have a writ of possession therefor, that he recover his costs as against Miller, and that the defendant Newton go hence without day and recover his costs against the complainant.

The power of the court to render such a judgment we think full and complete under the concluding clause of the section above quoted, to wit: "or may render such judgment as the facts and the law warrant."

The authorities relied upon by the appellant were under statutes in which this provision does not occur.

In the leading case of *Sheldon v. Quinlen*, 5 Hill, 442, the provision construed is "or give such judgment for *either party* as the very right of the matter may seem to require."

Justice BRONSON says, "the word 'party' as here used stands for *plaintiff* or *defendant*, and includes all persons belonging to a particular class. The clause does not mean that a judgment which is entire may be reversed as to one defendant and affirmed as to another, without any regard to the rules of law applicable to the case."

This decision was followed in Wisconsin in a number of cases, but is questioned by Chief Judge DIXON in the case of *Detling v. Weber*, 29 Wis. 560.

It will be observed, however, that the provision is different from that in the statute of this State, in the essential words upon which the decision is made to turn.

We think the plain intention of the legislature was to empower the district courts to render an independent judgment upon the law and the evidence, without reference to the in-

quiry whether the judgment of the justice was an entirety or otherwise.

The judgment of the court below is affirmed with costs.

Affirmed.

BOARDMAN V. THOMPSON ET AL.

(8 Montana, 387. Supreme Court, 1879.)

Title not at issue in this action. In an action under the Forcible Entry and Detainer Act, the defendant is not allowed to show title in himself nor to disprove that of the plaintiff. The action does not supersede that of ejectment.

The California precedents are under a different statute and are inapplicable to Montana.

Writ of assistance—Entry during absence of party. An entry is not given by law until there has been an adjudication of the right; in such case a writ of assistance will issue; but until then a party entering in the temporary absence of another, is guilty of a forcible entry under the statute.

¹ **Limitation act.** Quiet possession by defendant for one year bars the action; until such period has elapsed, the court will not presume acquiescence from mere silence.

² **Staking boundaries as proof of possession.** The mere evidence of staking boundaries is not proof of possession, but it is proof of the *extent of possession*; and in the absence of a complete transcript, the court will presume sufficient evidence of plaintiff's possession was given.

Appeal from Second District, Deer Lodge County.

The opinion states the facts.

A. E. MAYHEW and SHARP & NAFTON, for appellants.

W. W. DIXON and SANDERS & CULLEN, for respondents.

WADE, C. J.

This is an action under the Forcible Entry and Detainer Act, instituted by the plaintiff to recover the possession of a portion of the Original Quartz lode, situate in the Summit Valley mining district, Deer Lodge county.

Our statute, giving this action and defining its nature and extent, is in effect but declaratory of the common law, as

¹ *National Co. v. Powers*, 1 M. R. 234.

² *Chamberlain v. Collinson*, 45 Iowa, 429; *Post LEASE; Morenhaut v. Wilson*, 1 M. R. 53.

modified by early Parliamentary enactments, and is as follows:

"Sec. 636. No person or persons shall hereafter make any entry into lands, tenements, or other possessions, or by entering upon any gulch mining claim, or any quartz mining lode claim, or other mining claim in the temporary absence of the party or parties in possession, or by entering peaceably and the turning out by force or frightening by threats, or other circumstances of terror, the party or parties out of possession, and detain and hold the same. In every such case, the person so offending shall be deemed guilty of a forcible entry and detainer within the meaning of this act, but not in cases where entry is given by law, and in such cases not with strong hand, nor with multitude of people, but only in a peaceable manner; and if any person from henceforth do the contrary, and thereof be duly convicted, he shall be punished by fine."

Sec. 643. "On the trial the complainant shall only be required to show, in addition to the forcible entry or detainer complained of, that he was peaceably in actual possession at the time of the forcible entry, or was entitled to the possession of the premises at the time of the unlawful holding over. The defendant may show in his defense that he or his ancestors, or those whose interest in such premises he claims, have been in quiet possession thereof for the space of one whole year together next before the said inquisition, and that his interest therein is not yet ended or determined; and such showing shall be a bar to the prosecution; and in no case where the title to land is involved, shall a justice of the peace have cognizance."

This statute was designed to protect the *possession* of real property. It provides a summary remedy when such possession is invaded, either by a forcible entry, or by a peaceable entry in the temporary absence of the person in possession or by an unlawful detainer. It restricts the issue at the trial to an inquiry into the actual and peaceable *possession* of the complainant, and the forcible entry or unlawful detainer of the defendant. It makes a whole year's peaceable, actual possession by the defendant a bar to the action, but it permits no inquiry either by complainant or defendant as to the *right* of possession. It inquires after the

fact of peaceable, actual possession, but does not trouble itself as to the *right*. That inquiry belongs to another form of action and to another tribunal. At common law a forcible entry or an unlawful detainer of real property was a public offense (4 Blackstone's Com. 148) and punished accordingly, but it was always an offense against the peaceable possession of the person in such possession, in which the question of the right of possession was not involved and could not be tried, the purpose of the trial being to punish the violence by which the forcible entry or the unlawful detainer was accomplished, and to restore the *possession* to the person from whom it had been violently taken or detained. And our summary civil remedy based upon and growing out of this public offense at common law preserves this distinguishing characteristic and forbids an inquiry into the title or right of possession of the person who by force and violence has been deprived of his peaceable possession, and is content to restore such possession to the person who has been violently deprived thereof, the great purpose of the action being to place the parties in the position they occupied before any force or violence had been used. When restored to this position, and not before, are they in a situation to institute a suitable action before a proper tribunal to try the question of title and right of possession. The obvious aim of the statute is to prevent any man from asserting his title or right by violence. Its purpose is to defeat the occupation and possession of property by force, and to cause every man to submit to the law instead of being a law unto himself.

1. After these general observations as to the meaning and purpose of the statute in question, we come now to inquire: Did the court err in excluding the evidence of defendant's title to the mining ground described in the complaint? In other words, is title an issue in an action of forcible entry and detainer? This question might be satisfactorily answered by ascertaining what it is necessary for the plaintiff to establish in order to maintain the action. And for this purpose it is only necessary to again look at section 643 of the act, where it is declared that the complainant shall only be required to show, in addition to the forcible entry or detainer complained of, that he was peaceably in the actual

possession at the time of the forcible entry, or was entitled to the possession at the time of the unlawful holding over. The defendant may controvert this possession of the plaintiff, and show possession in himself for the period of one whole year next before the inquisition, and this is the extent of his defense. It follows, therefore, that if the plaintiff establishes the fact that he was peaceably in the actual possession of the premises, and that the defendant at the time forcibly entered and took possession, he maintains his action, no matter if the defendant at the time of his entry was the owner of the title and entitled to the possession, and as to such title and right of possession they are wholly immaterial matters, forming no defense to the action, and can not be inquired into. Our statute is not peculiar in narrowing the issues and in limiting the defenses in this summary proceeding. In this regard we have followed the common law, as have the statutes of most of the States. Said Lord KENYON: "If the landlord had entered with a strong hand to dispossess the tenant with force (after the expiration of his term), he might have been indicted for a forcible entry": *Taunton v. Costar*, 7 Term R. 431. Said Sir WILLIAM RUSSELL: "There is no doubt that in England a party is indictable for forcible entry into premises in which he has the legal title": 2 Whart. Crim. Law, 2038.

At common law no allegation beyond possession was necessary, and of course mere possession was sufficient to support the prosecution: 2 Whart. Crim. Law, 2042. A party peaceably in the actual possession of lands at the time of a forcible entry, or in the constructive possession thereof at the time of a forcible holding over is entitled to proceed under the statute of forcible entry and detainer, though he is neither seized of a freehold nor possessed of a term of years in the premises: 4 Black Com. 148.

The defendant can neither go into evidence to disprove the title of the plaintiff nor to establish his own. The question of title can not be raised; the possession only of the plaintiff must appear; and the party in peaceable possession can not be legally ejected by force, though not entitled to such possession; but the question of right does not arise, and the defendant can not set up his right as a defense to his forcible entry or unlawful detainer: 2 Whart. Crim. Law, § 2044;

Bliss v. Range, 6 Conn. 78; *Black v. State*, 3 Yerg. (Tenn.) 388; *Shoudy v. School Directors*, 32 Ill. 290; *Smith v. Hoag*, 45 Id. 250; *Hunt v. Wilson*, 14 B. Monr. (Ky.) 44; *Spalding v. Mayhall*, 27 Mo. 377; *Gibson v. Tong*, 29 Id. 133; *Settle v. Henson*, 1 Morris (Iowa), 111; *Clark v. Stringfellow*, 4 Ala. 358; *Mitchell v. Davis*, 23 Cal. 381; *Dutton v. Tru cy*, 4 Conn. 79; *Fortier v. Ballance*, 5 Gib. 41.

It is claimed, however, that the California Forcible Entry and Detainer Act, and the decisions thereunder, have made an innovation upon the general rules as established by this long and unbroken line of decisions, and that the same are applicable to our statute. This claim requires examination.

Section 3 of the California Act of 1866 is as follows: "If any person shall, in the night time, or during the absence of the occupant of any lands or tenements, unlawfully enter upon such lands or tenements," etc., such person shall be deemed guilty of forcible entry, etc. In the case of *Conroy v. Duane*, 45 Cal. 601, arising under this act, the court held, not, indeed, that the defendant may make a defense by proving title and the right of possession in himself, as if these things were issues in the case, but that title and the right of possession may be proved in the defendant to show his good faith in making the entry, and that the same was not unlawful. Also, in the case of *Powell v. Lane*, 45 Cal. 678, the court say that an entry is not *unlawful* within the meaning of the third section of the act (quoted above), which was made peaceably and in good faith; referring to *Shelby v. Houston*, 38 Cal. 410. And in *Townsend v. Little*, 45 Id. 676, it was held, that if the defendant entered upon the land in good faith, believing she had a legal right to enter, the action of forcible entry and detainer could not be maintained against her.

But I apprehend that even under the California statute the circumstances in mitigation or in excuse of the entry should be properly pleaded in order to be proved; and if these decisions were applicable to the case in hand, under our statute, the failure of the answer to make these averments would preclude their proof. But our statute wisely, it seems to me, does not submit the question of the propriety of making a forcible entry to the judgment of the defendant. It does not permit the forcible *act* in the first instance, and the trial of the *right* thereafter.

It holds out no such inducement or invitation to any one to take forcible possession in the presence of the party in possession, or in his temporary absence to peaceably take possession and thereafter to hold it by force, and after a scene of personal violence and conflict, to try the question of the right of possession, not even though such person was clothed with the title and the right of possession. Our statute makes an entry under such circumstances unlawful, and brings the party making it within the prohibitions of the Forcible Entry and Detainer Act.

The party entitled to the possession can not take or hold such possession, and thereafter, in action of forcible entry, have his right to such possession adjudicated. But the proceedings under the statute were designed to undo the act of the party in taking or retaining forcible possession under a claim of right, and to place the parties in their former position, so that in a proper action their rights might be adjudicated. The Forcible Entry and Detainer Act was not designed to supersede the action of ejectment.

2. Our statute makes an entry lawful where it is given by law, and it is claimed by appellant by virtue of the California decisions before cited, that an entry is given by law where the party owns the property upon which he peaceably enters, even though another temporarily absent claims the possession. We do not understand that an entry is given by law until there has been an adjudication of the right, and a judgment awarding the possession. If land is bid off on a judgment, and the time of redemption has expired, a writ of assistance would issue to put the purchaser in possession. In such a case an entry would be given by law. But where the rights of the parties are undetermined, and the right of possession is claimed by both, if one of them, in the temporary absence of the other, takes peaceable possession, it can not be said that his entry is given by law. Our statute pointedly declares that in such a case the person making the entry shall be deemed guilty of a forcible entry, and treated accordingly.

3. The next assignment of error is predicated upon the following instruction given to the jury by the court: "If the jury believe, from the evidence, that the plaintiff consented to the possession taken by defendants, even though the posses-

sion was taken in the temporary absence of the plaintiff, they should find for the defendants. In determining whether or not the plaintiff consented to such possession, the jury may take into consideration the actions of the parties and their declarations. Mere silence, unless protracted for one year, would not warrant the jury in finding consent."

Our statute provides (§ 643) that quiet possession by the defendant for one whole year shall bar the prosecution.

If it requires a whole year's quiet possession by the defendant to bar the plaintiff's action, so, for the same reason, it ought to require a whole year's silence by the plaintiff before his consent to the defendant's possession can be presumed. The quiet possession of the defendant should ripen into a defense under the statute at the instant that the plaintiff by his silence forfeits his right of action. Until that period the plaintiff may maintain his action, for the reason that the defendant can interpose no bar to the prosecution. If, under the statute, quiet possession for 364 days by the defendant is no defense, then the plaintiff's silence for that period ought not to bar his action. The plaintiff's silence then gives no advantages, and confers no rights upon the defendant unless the same is continued for one whole year. It follows, therefore, that if the defendant makes a forcible entry, or a peaceable entry in the temporary absence of the plaintiff in possession, the plaintiff has one whole year in which to institute his action to recover the possession, unless he sooner gives his consent to the defendant's possession, and such consent can not be presumed by his silence until one year has elapsed.

If after such an entry by the defendant, the plaintiff may fail for one day or one month to prosecute his action to recover possession, he may so fail for any length of time short of the period when the defendant's quiet possession defeats his action, for as long as the possession of the defendant does not ripen into a right, so long the silence of the plaintiff creates no bar.

4. The body of the testimony was stricken from the transcript, and only one item thereof is preserved in the record, viz.: that mentioned in the bill of exceptions, number one, and in substance is as follows: That the plaintiff, on or about the 28th day of January, 1878, staked the ground described

in the complaint, by placing at each corner thereof a stake marked, N. M. & E. Co., meaning thereby the National Mining and Exploring Company. This testimony alone would not be sufficient to show the plaintiff's possession, but as only a small portion of the evidence in the case is before us, we must presume that such possession is satisfactorily established by showing that although the plaintiff marked the stake N. M. & E. Co., he in fact located the ground for himself, or that he was the lessee or grantee of the company, and if there was such proof, the item of evidence contained in the bill of exceptions, number one, was competent to show the extent of plaintiff's possession. A deed giving the boundaries of the property would have been admitted for the same purpose: *Brooks v. Bruyn*, 18 Ill. 539; *Mitchell v. Davis*, 23 Cal. 381.

The testimony being competent for one purpose, it was properly admitted.

It is therefore ordered that the judgment be affirmed with costs.

Judgment affirmed.

1. Party entering by force and preventing location by another can not take advantage of his wrong: *Robinson v. Imperial Co.*, 5 Nev. 44; *Post MILL SITE*; *Davis v. Scott*, 56 Cal. 165; *Atherton v. Fowler*, 96 U. S. 519; *U. S. v. Stanley*, 6 McLean, 409; *Erhardt v. Boaro*, 4 M. R. 432.

2. Forcible entry by one trespasser against another on public lands containing lead mines: *Lorimer v. Lewis*, 1 Morris, 253; *Post PUBLIC DOMAIN*.

3. The lawful owner may use force to effect his entry: *Depuy v. Williams*, 5 M. R. 251.

4. The original owner has no right to make a forcible entry upon the possession of a relocater: *Slavonian Co. v. Perasich*, 1 M. R. 541.

5. Threats do not amount to a forcible entry. *Id.*

6. Mere assertion of right, is no threat: *Stone v. Bumpus*, 4 M. R. 278.

7. Possession by an employe may be sufficient to make his ouster a forcible entry under the statute: *Baker v. Dickson*, 62 Cal. 19.

TERRITORY V. LEE.

(2 Montana, 124. Supreme Court, 1874.)

¹ **Territory can not take forfeiture.** A Territory can not declare or enforce to itself a forfeiture of mining claims on the public domain, located, purchased or held by an alien. The statute of Montana attempting such result is void.

² **Alienage, a matter between the subject and ruler.** Alienage is not a disability of which advantage can be taken by a citizen in a contest with an alien. It is the office of the government only to declare a forfeiture of the alien's estate. This rule (the court seem to intimate) would apply to the case of possessory mining claims on the public domain located or purchased by aliens and citizens adversely to each other.

Territorial sovereignty. The extent of power in a territorial legislature to regulate the primary disposal of the public lands considered.

Appeal from Second District, Deer Lodge County.

The judgment below in this action was rendered by KNOWLES, J., and was in favor of the Territory.

SHARP & NAPTON and S. WORD, for appellant.

H. N. BLAKE, District Attorney, 1st District, and J. C. ROBINSON, District Attorney, 2d District, for appellee.

WADE, C. J.

This was an action brought under and by virtue of an act of the territorial legislature, entitled "An act to provide for the forfeiture to the Territory of placer mines held by aliens," Cod. Sts. 593. The act substantially provides that no alien shall be allowed to acquire any title, interest or possessory or other right to any placer mine or claim, or to the profits or proceeds thereof in this Territory, and that when-

¹ This first head note covers the only point decided in the opinion; all the other matters inserted in the *syllabi* of the original report are mere *dicta*. The point stated in the second head note, *supra*, is a well known rule, but its application to this class of cases, where the alien still pretends to hold title on the public domain and has not parted with it, is a novelty. See cases under ALIENS and notes, 1 M. R. 508. The case is printed on account of its discussion of the power of territorial governments over the subject-matter of the suit.

² *Cræsus Co. v. Colorado Co.* 1 West C., R. 451; *Ferguson v. Neville*, 61 Cal. 356.

ever it shall be made to appear to any district attorney that any alien is in possession, occupation, use or enjoyment of any placer mine or claim, within the district of such district attorney, or that any alien claims any right, title or interest in or to any such mine or claim, by pre-emption, location, acquisition, or by gift, grant, bargain, sale, conveyance, transfer, assignment, lease or mortgage, it shall be the special duty of such district attorney, forthwith, to institute in the district court of the proper county an action in the name of the Territory, against such placer mine or claim for the forfeiture thereof to the Territory. And the act further provides that if upon the trial it shall be made to appear that the mine or claim in question is occupied, possessed or claimed by an alien, or that any right or interest therein has been sought to be conveyed to or vested in such alien, or in any one for his use or benefit, the court shall thereupon render a judgment of forfeiture to the Territory of such mine or claim, of whatever right, title or interest the alien would have acquired had he been a citizen; and upon this judgment there shall be an execution and sale, for the benefit of the Territory, and the proceeds of such sale shall be paid into the territorial treasury for the use of the Territory.

The complaint in this case sets forth the necessary averments under this statute, alleging that the defendant, Fank Lee, is an alien, and a subject of the Chinese Empire, and that he purchased of one Stevens, and by virtue of such purchase now holds, claims, occupies and is possessed of three thousand feet of placer mining ground in the complaint described. There was a demurrer to the complaint which was overruled, and judgment was rendered for the plaintiff; that the mining ground described in the complaint be forfeited to the Territory, and sold in pursuance of the provisions of the act aforesaid. From this judgment defendant appeals to this court.

By this appeal we are called upon to determine the validity of the statute, under and in pursuance of which the action was brought and prosecuted to judgment, and in making this investigation it will be convenient to inquire, first, what were the rights and disabilities of aliens in this Territory prior to the enactment of this statute; second, as to the power of the territorial legislature to enact a law of this character; and

third, is the act in question in harmony with the Organic Act of the Territory?

1. As to the right of an alien to purchase and hold real property, it may be stated as a general principle, deducible from the authorities, that alienage is a disability that can only be taken advantage of by the government, or the sovereign power in a State, and that the real property purchased by an alien does not vest in the government until office found, that is, until a proceeding before a jury, to inquire as to the question of alienage; and until such inquiry by the government, the alien is seized, and may protect and defend his property as a citizen, and may institute actions and prosecute suits under the laws for this purpose; and that as to sales and transfers of real estate, by or to aliens, they stand upon the same footing as sales and transfers made by citizens, subject only to the right of the sovereign power of the government to institute proceedings to cause a forfeiture.

This proposition is sustained in 2 Blackstone, 249, note 18, wherein it is asserted that the law as to purchases by aliens, is shortly this: that the purchase vests the land in the alien, but subject to be divested out of him for the benefit of the Crown, by the finding of an inquisition in the exchequer. An alien may be grantee in a deed, though his holding is precarious; for, on office found, the king shall have it by his prerogative: 2 Black. 273, note 14; Co. Litt. 2, b; 5 Co. 52; 1 Leon. 47.

"If," says Lord Coke (Co. Litt. 2), "an alien purchase houses, lands, tenements or hereditaments to him and his heirs, albeit he can have no heirs; yet he is of capacity to *take* a fee simple, but not to hold, for, upon office found, that is, upon the inquest of a proper jury, the king shall have it by his prerogative, of whomsoever the land is holden, and so it is if the alien doth purchase land and die, the law doth cast the freehold upon the king," but the estate purchased by an alien does not vest in the king until office found, until which time the alien is seized and may sustain actions for injuries to the property: 5 Co. 52, b; 1 Leon. 47; 2 Black. 293, note 10.

An alien may purchase lands and hold them against all the world but the State. Nor can he be divested of his estate even by the State until after formal proceedings, called "office

found;" and until that is done, may sell and convey or devise the lands, and pass a good title to the same: 1 Washb. Real Prop. 50, and authorities there cited.

An alien friend is entitled, at common law, not only to take and hold real estate, until office found, but to maintain an action for its recovery in case of an intrusion by an individual: *Bradstreet v. Oneida Co.*, 13 Wend. 546.

In the case of *McCreery v. Allender*, 4 Harr. & McH. 409, the Supreme Court of Maryland decided that the title of an alien friend is good against everybody but the State, and that his right and possession could not be divested but by office found, or some act done by the State to acquire possession, and judgment was given for the plaintiff, who was an alien and a British subject. See, also, *People v. Folsom*, 5 Cal. 373. This question has also been passed upon by the Supreme Court of the United States (*Craig v. Leslie*, 3 Wheat. 563), and the foregoing propositions fully and clearly sustained.

Alienage, then, is not a disability that can be taken advantage of by a private individual, and, as between citizen and alien, their titles are equally sacred and secure and equally entitled to the protection of the law.

Only the sovereign power of the State or government can demand forfeiture of an alien's property, and this authority proceeds from the right of self-protection which inheres in every government, giving it the power of self-preservation. But this is a great, sovereign, prerogative right which belongs only to the supreme power in a State, and can not be exercised by any subordinate, secondary or limited depositary of power. The authority to naturalize and to impose disabilities upon aliens belongs alone to sovereign power, and this leads us to the discussion of the second proposition concerning the sovereignty of a Territory.

2. Does the Territory of Montana possess the inherent sovereign power necessary to enable it to cause the forfeiture to itself of the property of aliens, situate within its territorial limits? And does it possess the power to forfeit to its own use and benefit property that never belonged to the Territory, in which the Territory never had any interest, the title to which still remains in the United States, subject only to a

possessory easement acquired by individuals, by leave and license granted by the general government? In other words, can the Territory forfeit to its own use, and thereby become the owner of property which the government, in its liberality, granted only to citizens and to those who have declared their intention to become such? And if there is a forfeiture of this possessory title which the government has granted to individuals, does not the property forfeited necessarily revert back to the general government, the original grantor? The solution of these questions necessarily leads to a discussion of the sovereignty of a Territory under the constitution and government of the United States. Before entering upon this subject, however, we wish to premise by saying that primarily the general government is the owner of all the soil within its territorial limits, and that it is the fountain and source from whence all title to the soil is acquired, and that by reason of this fact the right of forfeiture vests in the sovereign power of the general government; and the particular inquiry now is: Are the organized Territories belonging to the United States clothed with this sovereign power?

What do we mean by the term "sovereignty?" It is the exercise of, or right to exercise, supreme power, dominion, sway; and, as applied to a State, it is the right to exercise supreme power, dominion, authority. Says Vattel in his *Treatise on the Law of Nations*: "Nations or States are bodies politic—societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their mutual strength. Such a society has her affairs and interests. She deliberates and takes resolutions in common, thus becoming a moral person who possesses an understanding and a will peculiar to herself. From the very design that induces a number of men to form a society which has its common interests, and which is to act in concert, it is necessary that there should be established a public authority to order and direct what is to be done by each in relation to the end of the association. This political authority is the SOVEREIGNTY."

And this *sovereignty*, we may add, is the elemental prerogative of a nation, an essential attribute that gives to it being, life and character, and without which it can have no exist-

ence. Sovereignty makes a nation; it forms a State, and the lack of it makes a colony, a province, a dependence. Sovereignty implies the right to make laws and to enforce them, and the laws it enacts can not be modified, altered or abolished except by the same supreme power which enacts them. To this power belongs the authority to define the rights of persons, and it may regulate the manner and circumstances under which property is held, and may direct the modes of administering justice.

To this power belongs the right to declare war; to raise and support armies; to make treaties of peace, and to use all necessary means to self-preservation and protection. Sovereignty then signifies independence, absolute freedom and liberty, and a superiority to and exemption from every foreign or extraneous influence. Every nation, like every individual, possesses the inherent right of self-defense, and for this purpose it may use or destroy the property of its citizens, and to this power of a nation may be referred its right to make laws of escheat and forfeiture, providing when and under what circumstances property shall become forfeited to the State. The authority to enact laws of forfeiture is a sovereign prerogative, and belongs only to the supreme power of a nation. Is this sovereign power lodged in the Territory of Montana?

The region of country now included within the limits of this Territory was acquired by the United States from France by virtue of the Louisiana purchase in 1803. Out of this vast region thus acquired, several States have been formed and admitted into the Union, while in the balance of this Territory temporary governments have been established by Congress preparatory to their admission as States. By what authority does Congress thus assume to exercise jurisdiction and control over the several Territories belonging to the government? We might well argue that the right to acquire territory implied the right to govern it, and, if there was no controlling law on the subject, it might be well said that if the United States has the right to purchase territory from a foreign power, it could, after the purchase, exercise absolute dominion and authority over the property so purchased; but we are not compelled to resort to any implied power in determining the source of authority over the Territories.

Section 3, article 4, of the Constitution, provides that Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory, or other property belonging to the United States. Under and by virtue of this clause of the constitution, from time to time Congress has authorized and established temporary governments for the Territories, the first of which was provided by the ordinance of 1787, and afterward adopted by Congress, and from thence continuously until the present time. The governments thus established were and are temporary in their character, and only designed to subserve a temporary purpose.

These governments were, and now are, and at all times have been, under the complete control of Congress, and subject to abolition, modification or change, at the behest of the power which created them, and the laws enacted by the territorial legislatures are alike subject to modification or repeal by the action of Congress. These inherent infirmities in the governments, and legislative enactments of the Territories, at once rob them of all the essential attributes of sovereignty, and make them provinces, over whom the United States exercises supreme control. Under and by virtue of this clause of the constitution, above recited, Congress could sell and dispose of a Territory to a foreign power, and not only can it make all needful rules and regulations concerning the Territories, but can also abolish them, and the rules and regulations made by Congress are enacted laws, and congressional rules for the Territories can be made in no other manner.

With these sovereign powers residing in the general government, it seems idle to contend that a Territory is sovereign and supreme in any department of its authority.

These views and principles seem to be well supported by authority. Chancellor KENT, commenting upon the Territories belonging to the United States, says (Vol. 1, pp. 383-5): "With respect to the vast Territories belonging to the United States, Congress have assumed to exercise over them supreme powers of sovereignty. Exclusive and unlimited power of legislation is given to Congress by the constitution, and sanctioned by judicial decisions. * * * The general sovereignty existing in the government of the United States over the Territories is founded on the constitution, which declared

that Congress 'should have power to dispose of and make all needful rules and regulations respecting the Territories.' * * It would seem, from these various congressional regulations of the Territories belonging to the United States, that Congress have supreme power in the government of them, depending upon the exercise of their sound discretion."

The government of the United States, which can acquire territory by conquest, must, as an inevitable consequence, possess the power to govern it. The Territories must be under the jurisdiction and dominion of the Union, or be without any government; for the Territories do not, when acquired, become entitled to self-government, and they are not subject to the jurisdiction of any State. They fall under the power given to Congress by the constitution: *American Ins. Co. v. Canter*, 1 Pet. 511.

In the same case, MARSHALL, C. J. says that Congress, in legislating for the Territories, exercises for them the combined powers of the general and State governments.

Neither can it be said that Congress, in giving to the Territories an organic act, delegates any of its sovereign authority; for not only can the organic acts be altered or abolished, but all laws made under and by virtue thereof, by the territorial legislatures, are subject to congressional supervision, showing that sovereignty alone resides with Congress. It may, however, be said that a Territory is a distinct political society, and therefore sovereign in its action, except as limited by the Organic Act, as the States of the Union are sovereign, except as limited by the Federal Constitution. To this it may be answered that sovereignty does not abide with the Territory, for the reason that its action is subject to approval or disapproval by a higher authority, while Congress exercises and can exercise no authority whatever over the enactments of a State legislature. To the State in the Union the people are secured the right of self-government, while the people of the Territories have not this right and depend for their government on the will of Congress. The State regulates its own internal concerns, while Congress directs the internal affairs of a Territory.

In a Territory the courts have no final jurisdiction. An appeal being allowed to the Supreme Court of the United

States in every case, only limited by the amount involved, the legislature acts with limited and contracted authority, and all its laws and statutes are subject to the approval or disapproval of Congress; and the power of the executive and the tenure of his office are likewise subject to the sovereign power and will of Congress and the president, and in nothing pertaining to the existence, organization or power of a Territory is it sovereign and master of itself. The general government may sell it to a foreign power, may abolish its government, may annex it to another Territory, or may divide or change its form of government; its executive is the mere creature of the president and the senate; its organic act, creating a judiciary and a local legislature, may at any time be altered and abolished. Therefore it is that a Territory has no sovereign power or authority whatever, and, hence, has no authority to impose disabilities upon aliens within its limits, and much less has it the right to confiscate to its own use and benefit their property. Laws providing for the forfeiture of real estate, or any interest therein, while yet the title remains in the United States, and while, if any forfeiture is had, the property rightfully reverts to its original owner and proprietor, do not come within the scope of rightful subjects for territorial legislation, for legislation upon this subject, by every analogy, belongs exclusively to Congress.

Before the passage of this act of the territorial legislature forfeiting the property of aliens within the Territory, the alien could hold, and did hold and enjoy, the possessory title to mining claims, procuring such title by purchase, which title was an easement therein, the balance of the title belonging to the United States, so that the alien and the government, taken together, owned the complete title. The Territory had no interest whatever in the claims, held by aliens or by any other persons, and no title or shadow of title thereto, but by the operation of this statute the Territory becomes the owner of the possessory title which is or may be the entire equitable interest, and is authorized to sell the same for its own use, so that, by the force of this statute, it becomes the owner of property in which it never had any interest, and which never belonged to it, and it forfeits the property of an alien and calls it its own, while if any forfeiture takes place for any

reason whatever, the property thus forfeited necessarily belongs to the United States. The Territory can not acquire title to property that does not and never did belong to it, so easily as this.

There might be reason and plausibility in a statute of this kind providing the Territory was clothed with foreign power, and owned the paramount title to the property sought to be confiscated; but in the absence of sovereignty, and in the absence of any title or interest in the property, and while the general government is yet the owner of the legal title, and while, if any interest in the property is forfeited, it naturally and rightfully reverts to the sovereign, the general government, who holds the paramount title to all the property within its limits, it certainly is an unwarranted exercise of power for the temporary government of a Territory to undertake, by forfeiture, to convert to its own use property, which, if subject to forfeiture at all, should be forfeited to the government of the United States.

Unquestionably, Congress could enact and enforce a law similar in its provisions to the one under consideration, because it is clothed with the necessary power, and because the unoccupied lands in the Territories belong to the government and it has the right to say who shall possess such lands; and exercising this right, by the act of July 26, 1866, the government authorized citizens, and those persons who have declared their intentions to become such, to enter upon, explore and possess such unoccupied mineral lands, and if persons not authorized by this act enter upon such lands, or if they acquire, by purchase, the possessory title to the same, and thereby the lands become subject to forfeiture, it is a matter for the general government to take action in relation to, and in which the Territory has no right and no interest. It will be observed that this act of Congress does not prohibit citizens, who rightfully acquire this possessory title, from selling and transferring the same to aliens, or to any other persons. But with no statute upon the subject, and by virtue of the common law, if an alien takes a title to a possessory right in any such lands, upon proper inquisition before a jury, or upon office found, such title could be forfeited to the government, and this sovereign right belonging to the general government,

the sovereignty of the Territories, as to this matter, is necessarily excluded.

Only those persons authorized by the act of July 26, 1866, are licensed to enter upon, explore and possess the mineral lands belonging to the United States. The persons given this right by virtue of this act are citizens and those who have declared their intention to become citizens. All others, by necessary implication, are excluded, and this exclusion would apply to a State, or a Territory, as well as to an alien, and the very terms of the act that exclude aliens from *entering* also exclude the Territory from *holding* the possessory title to the mineral lands, and an action for forfeiture by the general government against the Territory in such case would be much more appropriate than such an action by the Territory against an alien.

The Territory lacks three essential elements necessary and requisite in order to enable it to maintain this action, and in order to give validity to this statute: first, the sovereign power and authority to confiscate and forfeit to itself property, and especially property in which it has no interest, and no title, the sovereignty of the United States and its title necessarily excluding any action by the Territory; second, the Territory is not the party in interest, and is officiously meddling with what does not concern it; and, third, the inability of the Territory, under the act of 1866, to take and to hold the possessory title to the mineral lands belonging to the United States.

It is argued that this statute of the Territory does not conflict with the act of Congress of 1866, which provides that only citizens, and those who have declared their intention to become citizens, shall have the right to enter upon and possess the mineral lands, and that this statute confiscating the possessory titles of aliens is only in aid of the act of Congress. But it will be observed that the act of 1866 does not authorize the forfeiture of the title of aliens, and if it did, the forfeiture would take place to the United States, and the Territory could take no action in the matter unless specially authorized by Congress. The Territory is not called upon to aid Congress or the executive in the execution and enforcement of the laws of the general government, and the volun-

tary aid of the Territory is without authority, without reason, and therefore void.

3. Is the statute in question in harmony with the Organic Act of the Territory?

The Organic Act provides, section 6, that the territorial legislature shall pass no law interfering with the primary disposal of the soil. Notwithstanding the Organic Act whereby a temporary government is created for the Territory, the general government, being the owner of the soil, still retains its ownership, and has made all the necessary laws and regulations directing how its property shall be disposed of, and how title thereto shall be conveyed. The Territory can enact no valid law that, in any manner, impedes, modifies or varies the operation of the laws of the general government as to the disposal of its lands. Neither can the Territory do, by indirection, what it is prohibited from doing directly, so that, if any territorial statute, enacted for a local or for a temporary purpose, in its workings, in its operations and effects, defeats the laws of Congress as to the disposal of the public lands of the Territory, such statute is necessarily void. The statute in question provides that the mining claims held by aliens shall be forfeited to the Territory, so that the Territory becomes the owner of the possessory title to such claim. Laying aside the fact that the Territory thus becomes the owner of property that does not belong to it, yet it obtains possession of the title, and this possession necessarily interferes with the disposal of the soil by the United States to the citizen or settler. If the possessory title is forfeited, the property should again become subject to location by the persons entitled to make such location; but the Territory comes forward and says by its legislature, "that, although the title to this property is forfeited and it thereby becomes subject to entry and location, yet I have acquired this property, and if any one obtains possession of it they must purchase of me." The Territory thus acquires a possessory title, in violation of the act of 1866, and in direct violation of the Organic Act, for the title of the Territory interferes directly with the primary disposal of the soil to the citizen by the general government. It does not require argument or authority to determine that if the Territory holds possession of mining claims

it interferes with the acquisition of possession by the citizen, and thereby interferes with the disposal of the soil; and the fact that the Territory is authorized to sell its possessory title by causing an execution to issue, does not help the matter, for by this means the primary disposal of the soil is transferred from the general government to the Territory. This statute is in conflict with the Organic Act.

The act of Congress of May 10, 1872, "to promote the development of the mining resources of the United States," in its spirit and intention, is in direct conflict with the territorial statute under which this action was brought. The act of Congress, after defining the mode and manner by which titles to the mineral lands may be acquired, and providing when and to whom patents may be issued, enacts that "nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever;" that is to say, after the citizen, or those who have declared their intentions to become such, shall have acquired title to their mining ground from the government by patent, they shall have the right to sell the same to any person whatever, whether such person be alien or citizen, Chinaman or American. If the absolute title can be thus conveyed to an alien, it would be strange indeed if the mere possessory title or right could not likewise be conveyed to the same individuals. If the alien is made capable by the general government of holding the highest title, by what process of reasoning do we arrive at the conclusion that the territorial legislature can say that if he acquires a mere possessory title it shall be forfeited? It was clearly the intention of Congress, by the act of May, 1872, to authorize and permit the citizen who had obtained a patent to his mining ground to sell the same to aliens if he so desired, thereby to aid the development of our mineral resources by the use of foreign capital; and as long as this act remains in force there can be no reason or validity in or to a territorial statute subjecting the inferior titles of aliens to forfeiture and confiscation, while their absolute titles are made sacred by the act of the general government.

The judgment below is reversed and cause remanded.

Judgment reversed.

SERVIS, J., concurring.—This was a proceeding instituted by the district attorney for the second judicial district for the county of Deer Lodge, for the forfeiture to the Territory of Montana of 3,000 feet of mining ground, purchased by the defendant, Faulk Lee (a Chinaman), from one S. Stevens, in September, 1872, under an act passed by the legislative assembly of the Territory, January 12, 1872, entitled, "*An act to provide for the forfeiture to the Territory of placer mines held by aliens*," whereby all aliens are prohibited from acquiring any title, interest, or possessory or other right to any placer mine or claim within this Territory, or to any profits or proceeds thereof. And it further provides for the mode of procedure to forfeit the same. Cod. Sts. 593.

To the complaint filed by the district attorney, the defendant, by counsel, *demurred*, as follows: *First*, to the jurisdiction of the court as to the person of the defendant, and the subject of the cause of action; and, *second*, for want of sufficient facts stated to constitute a cause of action; which demurrer was overruled by the court below, a decree of forfeiture entered, and the mining ground ordered to be sold as upon executions at law. From which the defendant appealed to this court.

The only question presented in argument, and raised by the demurrer, is as to the authority of the territorial legislature to enact the law under which this forfeiture was had.

Assuming (as do counsel in argument) that the mining ground in controversy was, and is, a part and parcel of the public domain, had the legislative assembly of the Territory the rightful authority to enact the law under consideration?

Legislative assemblies, like all other departments of the government, exercise only delegated authority; and any act passed by it not fairly falling within the scope of legislative authority, is as clearly void as though expressly prohibited.

A correct solution of the question before us necessarily leads to an examination, not only of the Organic Act of the Territory, but also of some of the provisions of the constitution of the United States.

It is the right of the legislative assembly to enact laws under the restrictions of the Organic Act and the constitution, and the province of the courts to construe them.

The presumption is always in favor of the validity of such laws, and it is only when there is manifest assumption of authority, and a clear incompatibility between them and the fundamental law, that judicial authority will refuse to execute them. And although it has often been truly said that courts, when called upon to construe laws with respect to their constitutionality, are always treading upon dangerous ground, and that objections to declaring a statute void should ever be listened to with attentive earnestness, yet this duty, which no judge should court, is one from which no judge should shrink.

With this statement of the case and the relative rights and duties of the law-making and law-construing powers, let us proceed to an examination of the question before us.

The 6th section of the Organic Act of this Territory provides "that the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil."

And by the 3d section of the 4th article of the Constitution of the United States it is provided: "The Congress shall have power to dispose of, and make all needful rules and regulations respecting the Territory or other property belonging to the United States. * * *

And again, it is also provided by the 14th amendment to the constitution, section 1: " * * * Nor shall any *State* deprive any *person* of life, liberty or property without due process of law, nor deny to any *person* within its jurisdiction the equal protection of the laws."

Before proceeding to an examination and application of these fundamental principles to the question under consideration, I can not pass unnoticed, at least to some extent, the able arguments of the respective counsel. The counsel for the appellant urge and insist that the treaty made by the government of the United States with the empire of China, and approved February 5, 1870, called the "Burlingame Treaty," guarantees to the defendant, as well as to all subjects of the Chinese Empire within the United States, the same privileges, exemptions and immunities as are here possessed and enjoyed by American citizens.

The article of the treaty referred to, whereby it is assumed these rights are guaranteed, is article 6 of that treaty (16 U. S. Sta. 740), which provides: "Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation; and, reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation."

This provision of the treaty, in my judgment, does not and can not, by any construction, liberal or otherwise, grant, either to the American in China, or to the Chinaman in America, any greater privileges than are guaranteed by the laws of the respective countries to *other* alien subjects; and this is not only the literal, but the correct interpretation of this provision of the treaty.

Then, *what* rights and privileges are, by the constitution and laws of the United States, guaranteed or granted to *all* aliens? And the answer is found in the various enactments of Congress, to which I shall presently refer, and which were passed both before and since the ratification of the "Burlingame Treaty," wherein Congress not only assumes control over the Territories, but especially provides that *none but citizens* of the United States, or those who have declared their intentions to become such, *shall possess* any of the public domain; and these acts of Congress so far have never been repealed.

It is urged, by counsel for the Territory, that inasmuch as the character of the property in question has always been treated as real estate, and that by the common law an alien could not hold or enjoy the same within the United States, this principle of the common law, if not directly, at least by implication, has been engrafted into the Organic Act of this Territory, and that therefore the act in question was one of rightful legislation.

It must be observed that the remedy hitherto provided for a violation of this principle of the common law was never such as is attempted in the act under consideration; but the mode of procedure has always been by the general govern-

ment, through its attorney-general, in the nature of what is termed *office found*, whereby the alien trespasser was ejected from the premises, which then became *publici juris*, and resort to legislative confiscation and forfeiture were never had; and if this principle of the common law has in fact been ingrafted into the Organic Act, it could have no greater effect than a simple continued recognition of that principle; but I do not think that, by any known rule of construction, it can even be inferred that any such principle is contained in the Organic Act of this Territory.

When the framers of the great fundamental law of the land provided, "The Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory, or other property belonging to the United States," they did not intend thereby that the Congress should delegate that power to some other inferior legislative assembly, else they would have so said. Neither did Congress so understand or intend, when it created and organized this Territory; for it is thereby and therein provided, that all territorial legislation shall be consistent with the constitution and with the Organic Act; and that no law shall be enacted by the legislative assembly of the Territory in any wise interfering with the primary disposal of the soil.

It is urged, in support of the validity of this so-called "Alien Law," that it is not an interference with the primary disposal of the soil, but that it is only a "*rule*" or sort of police regulation, regulating the possessory tenures to the public mines; and that such right so to regulate and rule the same is recognized by the various acts of Congress, passed July 26, 1866, July 9, 1870, and May 10, 1872, whereby the mineral lands of the public domain are declared free and open to exploration, occupation and purchase, by citizens of the United States, and those who have declared their intentions to become such, under regulations provided by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

These acts of Congress do most unquestionably recognize in local legislative assemblies, as well as in properly organized assemblies of miners, in their respective min-

ing districts, the authority to *regulate* the exploration, occupation and purchase from one another, of such unoccupied parts of the public mineral domain as may be within their respective local jurisdictions, so far as the same may be applicable thereto and not inconsistent with the constitution and laws of the United States.

But the *extent* to which these local legislative bodies can regulate these possessory tenures of the public domain seems to be the all-absorbing question to be determined. All that local legislation has done, or may do, can, by the Congress, be undone and wholly abrogated. It can not only do this, but it can repeal *all* laws upon the subject, and enact others in their stead; and I am of the opinion that Congress, in assuming control over the territorial domain under the constitution, and in passing laws regulating the same, has only recognized the right of local legislation, so as to make rules for the amount to be located, the manner of working the same, together with necessary rules to the complete development thereof, and appropriation of the minerals therefrom. And this is the *extent* of recognized local legislation thereon. Any attempt by local enactment, whereby to oust one person from a possessory right acquired under the act of Congress granting freedom to the mines without title, and putting another in possession thereof, whether the possession from which he may be ousted be lawful or unlawful, is an unauthorized assumption of power, and void. Such an act, although it may not, in fact nor in fee, dispose of the soil, is nevertheless an interference with the primary disposal of the soil. It deprives the once occupant thereof from holding and working the same, and by its operation pretends to transfer, under judicial proceedings, a once acquired possessory right, whereby the citizen is prohibited and prevented from taking up or entering upon the same, or the government from conveying the same by patent, as otherwise the citizen or government might.

Had the government, after the passage of this act, issued its patent to the defendant for the very mining ground in question, whether authorized or unauthorized, would it not be absurd to claim that the territorial legislature could assume such superiority over the general government as to cancel or

annul it? Certainly not. But this is no more absurd and inconsistent than is the territorial act itself. That act declares that an alien has not, can not and shall not have *any interest* in placer mining ground within the Territory, and by the same act provides for the forfeiture of that *no interest*, and for a sale and conveyance thereof.

What, I ask, is to be forfeited? What to be sold and conveyed? Simply a *trespass*, and that, too, that was not a trespass to the Territory, nor to any of its property, but if a trespass at all, a trespass upon the lands of the general government, over which the Territory could not exercise any control, for, as I have already shown, such power was *reserved to the Congress*, and it has from time to time ever since exercised such control by seemingly proper and legitimate legislation.

Of this reserved power in the constitution I think there can be no doubt. The language used in section six of our Organic Act is borrowed from those of the earlier Territories—Dakota, Nevada, Nebraska and Colorado, where it has ever been understood as containing a full reservation of the right of Congress over the Territories and the public domain.

So strongly has Congress emphasized its power over the public domain that in the acts admitting States into the Union the people are required to agree and declare that *they forever disclaim any right or title to the unappropriated lands within the Territory*. See, for instance, the enabling act of Nebraska, approved April 19, 1864.

If, then, a *State* can not control or interfere with the disposal of the public lands within its boundaries, nor deny to any person within its jurisdiction the equal protection of the laws (although Congress may and has), much less can a Territory.

I am therefore of the opinion that the said act, entitled "An act to provide for the forfeiture to the Territory of placer mines held by aliens," is inconsistent with the Organic Act of the Territory, repugnant to the constitution of the United States, and therefore void.

KNOWLES, J., dissenting.

I can not agree with the majority of the court in this case, for the following reasons:

When a citizen of the United States locates any portion of the public domain, containing precious metals, in accordance with the local rules and regulations of miners, the government of the United States becomes divested of an easement in that particular portion of the public domain, and such locator becomes the owner thereof. To the extent of this easement, that parcel of mining ground ceases to be public domain. The government has parted with the title to this extent, and a citizen has acquired it. This court has held this view in the case of *Robertson v. Smith*, 1 Mon. 410.

To the extent of this easement, I do not see that any portion of mining land, so acquired, is any more public domain than a section of agricultural land for which the general government has given a patent to a pre-emptor. It is true, all the title, except this easement, is in the general government, and to that extent and no more it is public domain. In the opinions of my brother judges, they, in effect, say, that the paramount title to mineral ground, although the same may be properly located, is still in the general government. When a person has parted with a title to land, how can he be said to have the paramount title still to it?

This court, in the case above referred to, held, that when mining ground was properly located, the government parted with the title to an easement in the same. How then can it be maintained that the government still has the paramount title to this ground so far as this easement is concerned?

There appears to have been an impression, on the part of my brother justices, that should the Territory forfeit and sell this easement, the purchaser would acquire a greater interest in the land than the first locator of the mine. This is not so, however. He would take only a mining easement, and he would take this subject to the conditions, the mining rules and regulations attached to the estate, namely, the conditions of forfeiture should he fail to comply with them. Again, it is claimed that this law under consideration interferes with the primary disposal of the soil. What is understood by the phrase "primary disposal of the soil?" The disposal of it by the general government, nothing more. But when mines are duly located, the government has disposed of the ground containing them to the extent of an easement. All the law un-

der consideration proposes to do is to forfeit this easement. How then can this law interfere with the primary disposal of the soil, when to the extent this law affects the soil the government has already disposed of it? The chief justice, in his opinion, holds that a forfeiture of land conveyed to an alien can only be made to the sovereign power in the State. And he claims that the Territory of Montana has no sovereignty, but that all the sovereign power within its border is vested in the general government of the United States, and hence that this government is the only one that can claim forfeiture of real estate sold to an alien. I know that there has been a good deal of talk about a Territory not being sovereign, but this is the only legal opinion of which I have any knowledge that so decides. All of the decisions in relation to organized Territories speak of them as governments. Our Organic Act calls this a temporary government. Let us see what this government is. It has an executive department, a judicial department and a legislative department. What powers are vested in each?

The executive power is vested in a governor. It is provided that he shall be the commander-in-chief of the militia of the Territory; he may grant pardons and respites against the laws of the Territory; he shall commission all the officers of the Territory who shall be *appointed* to office under the laws thereof; he shall take care that the laws be faithfully executed, and possesses the veto power. Are these not attributes of sovereignty?

The legislative authority is vested in a governor and a legislative assembly. The legislative power extends to all rightful subjects of legislation consistent with the constitution and laws of the United States, and the provisions of our Organic Act. It has, under such a grant, power to provide for the levying and collection of taxes; to pass laws for the punishment of all crimes and misdemeanors; to regulate domestic relations; to regulate the conveying and tenure of property; to regulate and give the power of transmitting by devise and wills, and the distribution of estates among heirs. It has the power to organize the militia of the Territory, and to provide for calling the same to suppress insurrection against the laws of the

Territory, to repel the invasion of hostile Indians into the settled portions of the Territory, and even to repel the invasion of a foreign power invading its limits. Other powers might be enumerated. I do not think any State legislative authority in the Union has a more extensive grant of legislative powers. One further point may be noticed that will show more fully the extent of the power of our legislative department, and the character of our territorial government, namely, the legislative authority may grant a charter to a municipal corporation. This right has never been doubted. The city in which this court is now sitting has a charter of incorporation granted by the legislative department of the Territory. If the government of this Territory was but a municipal corporation, similar to that of a city government organized by a State legislature, could it possess such powers? Can a municipal corporation create a municipal corporation? The legal decisions of the past may be searched in vain for authority to sustain the exercise of such powers by a municipal corporation. It may be that since the amendment to our Organic Act, the power to charter corporations has been somewhat limited. If the legislative authority of the Territory did formerly possess the power to charter corporations to as unlimited an extent as a State, what was the necessity of that amendment?

The judicial power of the Territory is vested in a Supreme Court, district courts, probate courts and justices of the peace. The jurisdiction of these courts is as limited by law; that is, by the laws of our legislative authority. It is also provided that the said Supreme Court and district courts shall possess chancery as well as common law jurisdiction. What more extensive, judicial powers are vested in any State government in the Union? We have a government then, I hold, with an executive who possesses, in almost every essential particular, the same powers as the governors of the several States in the Union. We have a legislative assembly that enacts laws, not by-laws, and whose legislative power is not surpassed by the legislative authority of any State government. We have a judicial power as extensive as any State, vested in courts whose authority to enforce their judgments and orders is full and complete, and whose judgments would undoubtedly have

the same force and effect in a foreign nation as those of any State in the Union, and would have the same force in any State as the judgments of another State, were it not for the provisions of the national constitution. Yet it is held, that because all these powers are granted to our government by an act of Congress, it does not possess sovereignty. What does invest a government with sovereignty but the possessing and exercising of sovereign powers? Does it make any difference from whence sovereign powers are derived, whether from God, as claimed by kings, or from the people, as claimed by republics, or from a government possessed with the sovereignty over a country, as the United States has over the Territories? The United States government has only such sovereign powers as the people have granted or delegated to it. It does not claim to have received any power from a Divine source. Is it not sovereign? But it may be said that these powers are granted or delegated in perpetuity. Not so; there is a right reserved to amend our national constitution, and by virtue of this right, any sovereign power it now possesses may be taken from it. But suppose these sovereign powers are granted to the national government in perpetuity, and the sovereign powers bestowed upon a Territory are given temporarily? Can it be a safe rule to follow, in determining whether or not a government is sovereign, the ascertainment of whether the powers it possesses were given it in perpetuity or temporarily. There is no reason in such a rule.

If any government in the limits of the United States can be said to possess sovereignty, it must be because it has and exercises sovereign powers. It is said that the general government may divide our Territory or attach it to a State or another Territory. The general government reserved this right in our Organic Act. If a reservation in an Organic Act prevents a government from being sovereign, then the United States government is not sovereign, because there are reservations and limitations in our national constitution. And it might be pertinent to inquire, why was it thought necessary to put these reservations in our Organic Act? I can not see how a reservation in an Organic Act prevents the sovereign attributes possessed by the government it organizes from being attributes of sovereignty, and that government, to

the extent of these sovereign powers, from being sovereign, unless it takes something more than the rightful possession of sovereign powers to make a government sovereign. Again it is said the general government might sell our Territory. This power may be doubted. But admit that it can sell its power of eminent domain, can it sell the government called the temporary government of Montana Territory? That is what I claim possesses sovereignty. Can it sell the sovereign powers it has granted to this government? Can it farm out its executive, legislative, or judicial departments? If so, it is fortunate perhaps for our people that public virtue is so pure and exalted. I think my brothers, finding that our territorial government is lacking in some of the attributes or prerogatives generally found possessed by sovereign powers, have shut their eyes to the sovereign powers it does possess and found no sovereign powers reposed in it. But such a rule would find that, because the Queen of England did not possess as many sovereign powers as King William of Prussia, or the Czar of Russia, therefore she has no sovereign powers. The Territory of Montana having sovereign powers, I hold that, to the extent of these, she is sovereign; that in determining whether or not a government in the United States is sovereign, we should not look to the source of its powers or to their extent or duration, but to their possession. The right of Congress to grant to territorial governments the powers they possess has been acquiesced in by all the national courts. And they seem to have based this right upon the proposition that the United States is vested with sovereignty, as far as the Territories are concerned, just as, primarily, all sovereignty was vested in the people of the United States; and that as the people could grant the sovereignty they possessed to the national and state governments, so could the United States grant its sovereignty save as to national matters to the territorial governments. Whether or not this theory was based upon sound judicial principles in the start, it is not pertinent now to inquire. The general government has acted upon this theory so long that it is undoubtedly now the law.

Mr. Justice STORY, in his work on the constitution, says:
"Having a right to erect a territorial government, they may

confer on it such powers, legislative, judicial and executive; as they may deem best. They may confer upon it general legislative powers, subject only to the laws and constitution of the United States."

Again, in speaking of the courts created for a territory, he says: "They are legislative courts, created in virtue of the general right of sovereignty in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory of the United States." (2 Story on Const., § 1325.)

Judge KENT, in his Commentaries, says: "With respect to the vast Territories belonging to the United States, Congress have assumed to exercise over them supreme powers of sovereignty." (1 Kent's Com. 384.)

In the noted case of *Dred Scott v. Sandford*, all of the judges agreed that from some source, Congress had the power to form governments in the United States territory. The only dispute between the chief justice and myself upon this point is, as I understand it, as follows: He holds that Congress or the United States has sovereign power over a Territory, and that this sovereignty it has not or can not delegate or grant to a territorial government; while I hold that all the sovereign powers a territorial government possesses, were primarily reposed in the general government and that these it has granted to it. If it is claimed that the delegating or granting of sovereign powers to a government does not make it a sovereign power, then I answer that the government of the United States and the governments of the several States have no sovereignty, because it is an accepted theory of our government that the people are sovereign, and have granted or delegated to our governments some of their sovereign powers.

Our territorial governments have powers similar to those which the English colonies in America had charters, possessed. Mr. Justice BLACKSTONE describes them as "in the nature of civil corporations, with the power of making by-laws for their own internal regulations, not contrary to the laws of England; and with such rights and authorities as are specially given them in their several charters of incorporation.

They have a governor, named by the king (or, in some proprietary colonies, by the proprietor), who is his representative or deputy. They have courts of justice of their own, from whose decisions an appeal lies to the king and council here in England. Their general assemblies, which are their house of commons, together with their council of state, being their upper house, with the concurrence of the king, or his representative, the governor, make laws suited to their own emergencies." (1 Black. Com. 108.)

Mr. Justice STORY, in his Commentaries on the Constitution, says of this description, in § 161: "This is by no means a just or accurate description of the charter governments. They could not properly be considered as mere civil corporations of the realm, empowered to pass by-laws, but rather as great political establishments or colonies, possessing the general powers of government, and rights of sovereignty; dependent, indeed, and subject to the realm of England, but still possessing within their own territorial limits the general powers of legislation and taxation."

Again, speaking of the charters given to Massachusetts, he says: "But the charter of William and Mary, in 1691, was obviously upon a broader foundation, and was, in the strictest sense, a charter for general political government, a *constitution for a State with sovereign powers and prerogatives, and not for a mere municipality.*"

He proceeds then to state what the powers given under this charter were; and they are certainly not greater than those possessed by our territorial government. In pursuing the subject of the governments organized for the chartered American colonies, it will be found, I am sure, that in the main our Organic Act was borrowed from the provisions of the charters of New England colonies. They are too similar to leave any other conclusion than that the provisions of the former were suggested by the provisions of the latter; and it should be remembered that these chartered governments were organized by an authority that claimed, and who, it was acknowledged, possessed as unlimited a sovereignty over the colonial dominions, as the United States can be said to possess over the Territories of the United States.

Judge DILLON, in his work on municipal corporations, speaks of the free cities of Italy and the hanse towns of Germany, which arose during the "middle ages," and classes them as States, and treats of them as something more than civil corporations having power only to pass ordinances or by-laws. In Hallam's "Middle Ages," it is said of these hanse towns: "They were tacitly acknowledged to be equally sovereign with the electors and princes." Yet the governmental authority possessed by these towns was derived from the rulers, who possessed sovereignty over the country in which they were located. These cities certainly exercised sovereign rights and were treated as capable of entering into treaties and leagues.

The American colonists thought themselves capable of entering into leagues and compacts. Whatever may be said of the power of the general government over the Territories, its right to divide them, to sell them, or to repeal their organic acts, may also be said of the power the king of England claimed to exercise and often did exercise over the chartered American colonies, and of the power of the sovereigns in whose realms were located the hanse towns of Europe. Yet it will be found that it has always been claimed that to a certain extent those colonies and those towns were sovereign.

Holding then, as I do, that the Territory of Montana is a government possessing many sovereign powers, or in other words, possessing sovereignty, I come to the question, whether its legislative authority has the power to provide for the forfeiture of land held by aliens to the territorial government. It is conceded that our legislative power, having adopted the common law, so far as applicable, an alien can not hold the title to real estate in this Territory; in other words, that that portion of the common law that provides that an alien can not hold the title to land in a country of which he is not a citizen is applicable. And it may be remarked that there is no law of the United States to this effect, that I am aware of, and that it is only by virtue of this adoption of the common law in this Territory that this disability is imposed outside of the statute under consideration. It follows then that our legislative power can impose this disability. If it can do it in a round-about way, namely, by the adoption of the com

mon law it can do it directly. What was the object of creating this disability at common law?

Blackstone (1 Com. 372) lays down the rule and reason for it: "An alien born may purchase lands, or other estates; but not for his own use, for the king is thereupon entitled to them. If an alien could acquire a permanent property in lands, he must owe an allegiance, equally permanent with that property, to the king of England, which would, probably, be inconsistent with that which he owes to his own natural liege lord; besides that thereby the nation might, in time, be subject to foreign influence, and feel many other inconveniences." Chitty, in his note to this passage, says: "A political reason may be given for this, which I think stronger than any here adduced. If aliens were admitted to purchase and hold lands in this country, it might, at any time, be in the power of a foreign State to raise a powerful party amongst us; for power is ever the concomitant of property." And he proceeds to show how Russia resorted to this very means of acquiring large estates in Poland in furtherance of its covert design, which subsequently became manifested, of conquering and dismembering that now unhappy country. As I hold that our Territory has the power to suppress insurrection against its laws, to provide for calling out the militia therein, to repel the incursions of hostile Indians into our settlements, or to repel the invasion of any hostile foe who should come within our territorial limits, I am confident that it does possess the much less power of enacting laws so that no foreign power would be able to raise up a party within our borders hostile to the authority of our government. It may be said that it is no part of the powers vested in a Territory to protect itself against a foreign enemy, and that this power is vested by the constitution, in the general government. It has just as much power upon this point as any State in the Union has; and can it be maintained that a State can not raise troops and marshal them against a foreign foe as well as a domestic one that would seek to conquer and subdue it? To assert that any government can not do this is to deny the right of self-protection. The States in this Union have ever claimed the right to forfeit the title to real estate purchased by aliens within their borders, and the general government never has exercised that right.

The truth is, it makes but little difference upon what grounds the right is based for the fact is that all *governments* have claimed this right. It is considered a concomitant of government; a necessary power. Again, the forming of territorial governments had, for one of its objects, the building up of a body politic that would eventually be competent to be admitted into the Union as a State. Now if, in carrying out this object, it is found that a foreign and alien population which the laws of the national government will not allow to become citizens, or an alien population, who, from disinclination, or hostility to our institutions and government, refuse to become citizens, were acquiring such permanent interests in the Territory that they would hinder the settlement of desirable citizens of the United States, and prevent the organization of such a political community as would hinder us from becoming a State in the American Union, it certainly ought to be a rightful subject of legislation, the prevention of this acquisition of such property.

I have treated this subject thus far as though the property vested in an alien must be forfeited to a sovereign power. True, in England, the estate was forfeited on "office found" to the king, in whom is vested the sovereignty. In this country we have no king, and our governments to some extent take the place of kings. It was a provision of the common law that made the forfeiture of such estates to the king. We claim the right to change the common law on most every other subject. Why not upon this? Our legislative authority upon all subjects applicable to our condition adopts and changes and repeals the common law. This is generally admitted to be within its powers. It ought to have the right to repeal the common law that made the estate vested in an alien subject to forfeiture to the crown, and enact that it should be made to itself, even if it has no sovereignty, for it certainly has the same right of self-protection that a sovereign power has. The question of to whom the forfeiture shall be made is certainly the subject of law. It is not above legislative enactments. I do not think my brother justices would hold that Congress might not pass a law saying that the forfeiture need not be made to any sovereign power, but even might be made to a Territory, although it possessed no sovereignty,

or to a county. This only shows that this matter is a rightful subject of legislation. And I am unable to see how such legislation interferes with the constitution of the United States, its laws, or the Organic Act of our Territory, or is not a rightful subject of legislation, and these are the only limitations upon our legislative authority. Congress has delegated to the legislative power of the Territory the right to legislate upon all rightful subjects of legislation. States legislate upon this subject. Congress may. It is certainly a rightful subject of legislation, then. It seems to be contended, however, that the forfeiture can not be made to the Territory, for the reason that the Territory can not take the title to real estate. Our legislative authority passes laws authorizing counties to hold real estate for the purposes of court houses and jails; and school districts; real estate for the purposes of erecting school houses. Undoubtedly the Territory could buy real estate for the purposes of a territorial capitol, or for erecting a territorial college, or for any other purpose that was a legitimate object of government. And it has ever been contended by the English government, and the State governments of this Union, that it is a legitimate province of government to take the forfeiture of real estate vested in aliens, to prevent a foreign power from acquiring the ownership of permanent property in the country. The Territory of Montana, I repeat, is a government, and has the same rights of self-preservation as any other government. It is contended that the forfeiture must revert to the grantor. This is not law, "for the vendor is not affected by it, he having resigned his right, and received an equivalent in exchange," is the language of Justice BLACKSTONE (Book 1, page 372). The doctrine of this court, as I have before shown, is that the general government has parted with this easement, known as a mining claim in this case, and because it has become vested in an alien, it does not re-vest in the general government. There is no law that authorizes such a rule. And to show that this is not the law, I have but to state that in the "Western States," where the general government once owned the title to all the real estate, forfeitures are claimed and exacted by the States where real estate becomes vested in an alien. If property conveyed to an alien was held by him

for the benefit of the original grantor, this would not be the case. The general government, as to its title to lands, is considered only as an individual proprietor.

In this discussion I have only contended for the right of the territorial legislative authority to pass a law forfeiting real estate acquired by an alien to the Territory. I do not think it necessary to examine the law under consideration, to see whether it properly provides for such a forfeiture. My opinion is that it does. The majority of the court have based their judgment upon the ground mainly that the legislative power does not extend so far as to provide for such a forfeiture. I have contended that it does, and that it is a rightful subject of legislation. And I believe that time will fully demonstrate the benefits that would have accrued to this Territory had such legislation been sustained.¹

DOE ON THE DEMISE OF BRYAN V. BANCKS.

(4 Barnewall & Alderson, 401. King's Bench, 1821.)

Former recovery in ejectment. A recovery in ejectment (at common law) is no bar to a subsequent recovery by either party.

² **Forfeiture, at option of lessor.** A lease of coal mines provided that the lease should be void to all intents and purposes if the tenant should cease working at any time, two years. After the working had ceased more than two years, the lessor received rent. *Held*, that a tenancy from year to year was not thereby created, for the lease was not absolutely void by the cesser to work, but voidable at the option of the lessor; and that he might avoid the lease for any subsequent cesser of work amounting to two years, after the period for which rent was received.

Party can not plead his own wrong. A party can not plead his own broken covenants as effecting a forfeiture to his advantage.

Consolidation of one forfeiture does not prevent a landlord from asserting his right upon a subsequent cause of forfeiture occurring, unless through his failure, lessee has been induced to make expenditures.

Ejectment to recover lands and mines in the parish of Brosley, in the county of Salop. The day of demise laid in the declaration was the 18th of April, 1820. At the trial before RICHARDSON, J., at the last summer assizes for the county

¹ The Act was repealed in 1875.

² *Price v. Nicholas*, 4 Hughes C. C. 616; *Conger v. Duryee*, 90 N. Y. 594; *East Kongsberg Co., In re*, L. R. 1 Eq. 309; *Roberts v. Davey*, 4 B. & Ad. 664.

of Salop, it appeared in evidence, that on the 14th of December, 1802, Thomas Bryan, by an indenture of lease demised to Thomas Coombe and others all the colliery, coal-work, iron, stone-work, rocks and quarries, in and under certain pieces of ground of T. Bryan in the parish of Broseley, except trees, etc., with liberty to make pits, etc., *habendum* from the first of January next for ninety-nine years, rendering a royalty rent of 1s. 2d. for every ton of coals, and 3s. 6d. per acre for the land. The lease contained the following proviso: "Provided also, and it is mutually agreed between the parties hereto, that the aforesaid works should commence and begin within one year from the date thereof, and *if the same should stop or cease working at any time two years, this lease shall be deemed void to all intents and purposes.*" In 1809 the lease was assigned to the defendant, and he worked the mines effectually till May, 1813, when he withdrew the machinery, and, in fact, abandoned them. In May, 1815, May, 1817, and April, 1819, he, for the purpose of preserving the lease, raised a few tons of coals of hardly any value. At Michaelmas, 1817, Bryan received rent, and gave a receipt in the following words: "Received, the 29th September, 1817, of Mr. Bancks, by the hands of Mr. Birch, the sum of £4. 3s. for half a year's rent of land and pits, due this day, by me." In March, 1818, Bryan took possession of the mines; but Bancks brought an ejectment, and in Trinity term, 1819, obtained judgment by default, and a writ of possession was executed in Bancks' favor. It was objected, on the part of the defendant, that there was no forfeiture of the lease, as the works had never ceased for two years; secondly, that the forfeiture had been waived by the receipt of rent on the 29th of September, 1817; and, thirdly, that, at any rate, by the receipt of rent since the forfeiture, a tenancy from year to year had been created, which could only be determined by a notice to quit. The jury expressly found that since 1813 the workings had been temporary, collusive, and fraudulent. RICHARDSON, J., thereupon directed a verdict to be entered for the lessor of the plaintiff, reserving to the defendant leave to move to enter a nonsuit on the objections made at the trial. A rule *nisi* for this purpose having been obtained in last Michaelmas term,

CAMPBELL now showed cause.

JERVIS, contra.

ABBOTT, C. J.

The question in this case is, whether the lessor of the plaintiff, in the month of March, 1818, when he actually entered and took possession of the farm, had a right to do so. As the judgment obtained against the lessor of the plaintiff in 1819 is no bar to the plaintiff recovering in this action, so neither will our judgment in favor of the lessor of the plaintiff be conclusive against the defendant, but he may in his turn bring another ejectment. I am clearly of opinion that in March, 1818, the lessor of the plaintiff had a right to recover. If the defendant, the tenant of the mine, had first ceased to work on Michaelmas day, 1815, the landlord would have had a right to receive the rent that became due on Michaelmas day, 1817, because the cesser for two years is requisite in order to make the lease void, and he would also have a right to enter on the day after Michaelmas day, 1817; and if he had a right to enter, provided the cesser had been for two years only, terminating at Michaelmas day, 1817, which is the day of the receipt of the rent, it remains to be considered whether, if the tenant had ceased to work for six years, the lessor of the plaintiff would have had a right which he would have had on a cesser of two years. Unless the defendant can establish, first, that this lease became absolutely null and void at the end of the first two years, against both parties, so that no action whatever could be brought upon it, and unless he can also establish that the receipt of rent had the effect of creating a new tenancy from year to year, requiring notice to quit, the plaintiff is clearly entitled to recover. I am of opinion that, notwithstanding the language of this lease, it did not become absolutely void by a cesser of two years, unless the landlord thought fit to make it so. If, indeed, it were held that a lease thus became absolutely null and void, even where it was made to appear that there had been a continuance of the receipt of rent afterward, the consequence might be that when the landlord, at an advanced period, brought his action of covenant, he might be told that

he had no right to maintain that action, on the ground that the lease had become void by forfeiture many years before. My opinion is, that the lease did not become absolutely void at the end of the first two years, unless the landlord chose to make it so. He, however, forbears to do so, and continues receiving the rent, and giving the tenant an opportunity of setting to work at the mines, which he neglects to do. I am of opinion that the landlord had a right, as soon as he had received the rent up to Michaelmas day, 1817, to enter and avail himself of the forfeiture incurred during the last two years. I think he might have done so on the very next day; at any rate, he has a right, now that there has been a continued cesser for two years previous to the ejectment brought, to enter upon it. There is no distinction between the very day after the receipt of the rent and the period of a week or month. I am of opinion, that the legal effect of this instrument is, that it is voidable only at the election of the landlord, and that he is at liberty to make the lease void at the end of any two years, during which two years there had been a continued cesser to work. In the present case the defendant had ceased to work for the period of two years previous to the commencement of the action. I think, therefore, that the plaintiff is entitled to recover. This rule, therefore, must be discharged.

BAXLEY, J.—I am of opinion that the true construction of the proviso in this lease, "that it shall be null and void to all intents and purposes upon a cesser of two years," is, that it shall be voidable only at the option of the lessor, and that it does not lie in the mouth of the lessee, who has been guilty of a wrongful act in omitting to work in pursuance to his covenant, to avail himself of that wrongful act, and to insist that thereby the lease has become void to all intents and purposes. By the express provisions of the 13 Eliz. c. 10, certain ecclesiastical leases are made void to all intents, constructions and purposes; yet it has been frequently held that such leases are good during the life of the person by whom they are made. I think, therefore, that the fair construction of this lease is, that it is void only at the option of the lessor, and that the receipt of the rent on the 29th September, 1817, has not destroyed his right to bring this ejectment. I consider the demise as being, in substance, made in March, 1818, when

he entered on the premises. Now, if he had then brought an ejectment, he might have called a witness to prove that from March, 1816, down to March, 1818, he had been constantly watching the pit, and that no work had been going on. That witness may not have known the pit before; and it surely would be no answer to say that the defendant had been guilty of a previous cesser or, in other words, that he had not worked the mine from the 1st of March, 1813. The effect of the receipt of rent on the 29th September, 1817, can not amount to more than an acknowledgment on the part of the lessor of the plaintiff, that no forfeiture was then complete. He does not thereby admit that a forfeiture may not have been inchoate, but merely that it was not complete, so as to entitle him to bring an ejectment. I think that the landlord has it in his election to make this lease void or not; that he is not bound to exercise that election in the first instance; and that though he may waive it from time to time, he is at liberty afterward to insist on the forfeiture in respect of subsequent misconduct. The case of *Doe on the Demise of Boscawen v. Bliss*, 4 Taunt. 735, is very much in point. There it was expressly held, that a lessor who has a right of re-entry reserved, on a breach of a covenant not to underlet, does not, by waiving his re-entry on one underletting, lose his right to re-enter on a subsequent underletting. And GIBBS, J., is there reported to have said, "It might as well be contended that if a landlord once knew that his premises were out of repair, and did not sue instantly, he could never after re-enter for a breach of covenant committed by their not being repaired." I am of opinion that the receipt of the rent in September, 1817, did not destroy the right of the lessor of the plaintiff to take any part of the period between September, 1815, and September, 1817, as a period in which a forfeiture was inchoate and beginning: and that if the cause of forfeiture continued, he is at liberty to add to that the subsequent period, from September till the March following, so as to complete the period of two years. For these reasons, it seems to me that the verdict was right.

HOLROYD, J.—I am of opinion that the tenant can not insist that the lease is void against the will of his landlord, and also, that the acceptance of the rent will not create a tenancy

from year to year. The tenant can not insist that his own act amounted to a forfeiture; if he could, the consequence would be that in every instance of an action of covenant for rent brought on a lease containing a proviso that it should be void on the non-performance of the covenants, the landlord would be defeated by a tenant showing his own default at a prior period, which made the lease void. If that be so, there is nothing to prevent the landlord claiming for the forfeiture of this lease, for a ceasing to work subsequent to the 29th September, 1815. That ceasing to work for two years after the 29th of September, 1815, would not make a forfeiture until after the expiration of the day of the 29th September, 1817. Now that is not inconsistent with the receipt of the rent on that day, for supposing it to be a receipt of rent under the lease, still the landlord may consistently say that the lease was forfeited on the 30th September, or the 1st of October, 1817, for two years cesser of work prior to either of those days. Although the landlord, by the receipt of the rent on the 29th September, 1817, may have admitted that the lease was existing on that day, yet he may avoid it on a forfeiture which became complete at a subsequent period.

BEST, J.—In construing this clause of the lease, we must look to the object which the parties had in view. The rent was to depend upon the number of tons of coals raised. In order to derive any benefit from the mine, it was the object of the landlord, by introducing this clause, to compel the tenant to work it. The clause therefore was introduced solely for the benefit of the landlord, to enable him in case of a cesser to work, to take possession of the mines, and either work them himself or let them to some other tenant. That, therefore, being the object of the parties in introducing this clause, I think it will be fully answered by holding the lease to be void at the option of the landlord. Besides, I take it to be a universal principle of law and justice that no man can take advantage of his own wrong. Now it would be most inconsistent with that principle to permit the defendant to protect himself against the consequences of this action by afterward setting up his own wrongful act at a former period. It appears to me that this was a continued forfeiture, and that the landlord had a right to take advantage

of it whenever he thought proper so to do. If the tenant be induced by the landlord's not taking advantage of the forfeiture in the first instance to make improvements, a court of equity would perhaps grant him relief. Upon the whole, I am of opinion that the rule for a new trial should be discharged.

Rule discharged.

VON SCHMIDT ET AL. V. HUNTINGTON ET AL.

(1 California, 55. Supreme Court, 1850.)

Conciliation. The Mexican requirement of *conciliacion* which was an endeavor through judicial officers to effect a settlement before process issued or formal litigation began, was in force in California before the conquest, and it seems would be the regular proceeding since; but by common consent it has been discarded as a useless formality.

Custom under Mexican law was allowed not only to control, limit, modify and interpret the general rules of the system, but even to establish a rule in contravention of the written law; hence, the division of custom without law, custom contrary to law and custom according to law.

Retroactive statute. A statute should be, as a rule, construed to operate only upon the future; but unless controlled by constitutional prohibition it is competent for a legislature to give to a statute a retroactive effect.

Where parties are numerous, as in the case of a joint stock company composed of many shareholders, and it is impracticable to bring them all into court, a suit may be allowed by some of them on behalf of themselves and others without requiring all persons interested to be made parties.

Replication. All the allegations of an answer in chancery are to be taken as true where no replication has been filed, and the case is heard on bill and answer.

¹ Forfeiture not favored. Contracts as well as statutes providing for forfeiture must receive a strict construction, and the facts to support the forfeiture must be clear and not left to inference or argument.

Dissolution of association. A joint stock association formed for a definite period can not be voluntarily dissolved without unanimous consent; if such consent can not be had application must be made to the court.

Facts of the case. A joint stock association was formed in New York, called the New York Union Mining Company, for the purpose of mining in California between the dates, January 1, 1849, and October 1, 1853, with express prohibition of dissolution within one year after

¹ *Colman v. Clements*, 5 M. R. 247; *Wiseman v. McNulty*, 6 M. R. 326; *Waring v. Crow*, 5 M. R. 204.

reaching California, except on certain contingencies, which had not occurred: *Held*, that a portion of the company could not, contrary to the articles, dissolve the association of their own motion, but as it was impracticable to keep the company together or carry out the original plan, the court decreed a dissolution and a division of the assets.

Distribution among money shares and labor shares. The holders of the money shares had contributed money and paid the transportation of the holders of the labor shares who as yet had contributed no labor or other consideration: *Held*, that in such case the entire effects should be distributed to the holders of the money shares alone.

Forfeiture for desertion. The articles provided for forfeiture of shares for desertion, and for absence without leave. Upon the facts stated in the opinion the court held the shares, both money and labor, of parties who had not only left but tried to break up the company, to be rightfully forfeited; "desertion" and "absence without leave" distinguished.

Costs and counsel fees allowed out of the fund, a dissolution being the interest of *all* the parties.

This was an appeal from a decree of the Court of First Instance of the District of San Francisco. The facts of the case are sufficiently stated in the opinion of the court.

JOHN W. DWINELLE, for plaintiffs.

HALL McALLISTER, for defendants.

By the Court, BENNETT, J.

The parties to this suit, plaintiffs and defendants, in conjunction with others, formed a company in the city of New York, in the early part of the year 1849, under the name of the New York Union Mining Company. Articles of association were adopted, which declare that the persons whose names are subscribed thereto, agree to associate themselves for the purpose of prosecuting the business of mining in California, from the first day of January, 1849, until the first day of October, 1853; and that the company shall consist of not less than twenty-nine operative or working shareholders, who are required to devote their entire time and energies to promote the common interest in such manner as the company shall direct. In addition to various other officers, there was a finance committee provided for, consisting of the treasurer and two other operative shareholders, whose duty it was to take charge of the fiscal affairs

of the company. The defendants constituted this finance committee, and the complainants were operative shareholders.

The stock of the company consisted of 338 shares of \$250 each, making an aggregate of \$84,500. Each operative shareholder was entitled to eight shares, or \$2,000 of the stock, and was required, in addition thereto, to subscribe and pay for not less than two other shares. The residue of stock, being forty-eight shares, was taken in part by operative shareholders, and in part by persons not otherwise connected with the company. Thus, the whole stock of the company was divided into two distinct species—the one of 232 shares was denominated labor stock, and the other, of 106 shares, was denominated money stock. The articles further provided, that on the first day of October, in the year 1853, a meeting of the stockholders should be held in California, at which it was to be determined by a vote of a majority whether the company should continue another year, and the terms upon which it should be continued. There was a number of other regulations, and Article 22 was in the following words: “Any operative shareholder, who shall absent himself during any portion of the time hereby limited, without leave, or providing a proper substitute, unless relieved by a vote of a majority of the operative shareholders for good cause assigned, shall forfeit his interest in the labor stock of the company; and any operative shareholder who shall, within three months after the arrival of the company in California, desert the company without leave, shall, in addition to his labor stock, forfeit his two shares of money stock.” Other articles, so far as they are of importance in this suit, will be noticed hereafter.

The company arrived in California about the first of September, 1849. Peter Von Schmidt, one of the plaintiffs, arrived ten days after, and the other plaintiffs about three months before that date. Previous to the arrival of Peter Von Schmidt the company had held a meeting, and had expelled him and the other plaintiffs from the company, and declared both their labor and money stock forfeited. On the twenty-sixth day of November last, the plaintiffs filed this bill to compel the company to reinstate them, alleging that it was found impracticable to keep the company together, that their labors as a company could have no profitable results, that a

dissolution had been resolved upon and declared, that a part of the property had been sold, and that all the residue had been advertised for sale at auction. The bill also alleged that the defendants had been directed by the company to make a dividend of the proceeds of the sales upon the 232 shares of labor stock, equally with the 106 shares of money stock. The bill prays, in substance, for a decree that the proceeds arising upon the sale of the company's property be distributed amongst the money shares alone, and that the plaintiffs be relieved from the forfeiture of the stock incurred or pretended to have been incurred by them, so that they may receive their dividends, together with the other members, upon all the money shares which they had bought. The bill also prays for an injunction and the appointment of a receiver, but contains no express prayer for a dissolution of the company.

The defendants put in a plea in which it is alleged that the plaintiffs had not brought into court any certificate of failure of *conciliacion* between the parties. The plea was overruled by the court below, whereupon the defendants put in their answer, the material portions of which will be hereafter noticed.

The cause was heard on bill and answer, and a decree was made in the court below, restoring the plaintiffs to their forfeited rights, appointing a receiver, and directing a distribution of the effects of the company equally upon the labor and the money shares. From this decree the appeal is taken by the defendants.

The first point which we propose to examine in reviewing the positions of counsel, is that relating to *conciliacion*. Although this point has been frequently made heretofore, it has not been found necessary, in the disposition of any case, for the court to express its views upon the subject; but it is now presented in the formal shape of a dilatory exception, put in at the very outset of the proceedings, which we apprehend to be the proper, if not the only, method of bringing the question regularly before the court: 1 White's Recopilacion, 259, 260 and 383; Escriche Dic. Title, "Excepcion." Being thus an objection *in limine*, taken in due time and in the appropriate form, it must, if valid, put an end to the whole case; if not valid, it must, nevertheless, be disposed of before the other points of the case can be reached.

The proposition naturally resolves itself into two subdivisions. First, that *conciliacion* is required in this case by the Mexican law; and secondly, that being essential by the Mexican law, it has not been legally dispensed with since the American administration of justice in this country commenced.

First, then, is *conciliacion* required in such a case as the present by the Mexican law? It is provided by article forty of the fifth title (*ley*) of the Mexican Constitutional Law, that in order to the due institution of any suit whatsoever, either civil or criminal, for wrongs purely personal, the means of *conciliacion* must be first tried; and that the law will regulate the form of proceeding in such matters, the cases in which *conciliacion* need not take place, and everything else relating to the subject; and by article twenty-ninth of the sixth title it is declared, that it will be the province of *alcaldes* to exercise within their *pueblos* the functions of conciliators.

The Mexican decree of May 23, 1837, which was made in pursuance of the above requirements of the constitution, and which is generally supposed to have been in force in California at the time of the acquisition thereof by the American government, says, that it belongs exclusively to the *alcaldes* of the *Ayuntamientos*, and to the justices of the peace in places whose population consists of one thousand persons or more, to exercise within their territory, in respect to all classes of persons, without any exception, the functions of conciliators, according to the above provisions of the constitution: Arrillaga's *Colleccion de Decretos* of 1837, p. 422; Escriche *Dic. Appendix*, p. 703, Ed. 1842. It is there provided that, in order that the proceeding of *conciliacion* may take place, whosoever may have to institute any civil suit, the value of which exceeds one hundred dollars, or any criminal suit for severe injuries purely personal, shall make his complaint before the competent *alcalde* or justice of the peace, demanding verbally, that the person who is to be made defendant be summoned, in order to proceed in the trial of *conciliacion*. See authorities last above cited. Article ten ordains that no complaint, either civil or criminal, concerning injuries purely personal, can be admitted, without proving by

a competent certificate that the means of *conciliacion* have been attempted: Arrillaga's *Colleccion*, 1837, p. 419, and Escriche, as above cited. After excepting from the operation of article ten various cases relating to benefices and other ecclesiastical matters, causes which concern the public revenue, the municipal funds of towns, public institutions, and other matters not affecting the case at bar, article eleven proceeds as follows: "Neither is it (*conciliacion*) necessary in order to commence the summary and very summary possessory actions, that of the prohibition of a new work, or that of retraction; nor in order to expedite the making of inventories and the division of inheritances, nor in other urgent cases of like nature; but if a formal petition should afterward have to be put in, which may give rise to a litigated suit, then *conciliacion* ought to precede it." The same article, after again excepting certain cases of bankruptcy, closes with a general clause requiring *conciliacion*, "whenever any citizen may have to demand, by due course of law, the payment of a debt, even though it accrue upon a contract of record:" Arrillaga and Escriche, as above cited. This statute appears to have been only a revision of previous statutes, and but declaratory of a long established law, for we find the same doctrine laid down by *Febrero*, 4 Feb. Mej. 420, *et seq.*, Ed. 1834; and by Peña y Peña, 1 Prac. For. Mej. 70, Ed. 1835. Indeed, its origin is to be traced far back, even to the period of the *Nueva Recopilacion*, in which it is declared, in speaking of the duties of judges, that they shall discourage litigation, as far as in them lies, by using their endeavors to induce parties to compose their differences voluntarily and in a friendly manner, by refusing legal process in cases of a trivial nature, whenever it can be done without prejudicing the lawful rights of the parties; and by making use of persuasion and all other means which their discretion shall dictate to convince the parties of the benefit which will result to them from a composition of their differences, and the damage and expense inseparable from litigation, even when accompanied with success: 4 Feb. Mej. 420; 1 Prac. For. Mej. 72; and see also 5 Tapia, Feb. 209, 213. It thus appears to be the policy, not only of the Mexican statute above referred to, but also of the Spanish and Mexican law, in all cases of a civil nature, which are sus-

ceptible of being completely terminated by the agreement of the parties, to require conciliatory measures to be tried until they shall result either in a satisfactory arrangement or in the entire failure to accomplish a reconciliation.

In the latter event, and in that event only, are the parties allowed to resort to the regular and formal mode of litigation in the ordinary courts.

This being the general rule, *conciliacion* was necessary under the Mexican statute in the case before us, unless it may be brought within some of the exceptions enumerated in that statute. Does it fall within any of those exceptions? It is not a verbal process, nor does it concern any benefice or other ecclesiastical matter, nor the public revenue, nor the municipal funds of towns, nor public institutions, nor minors, nor persons deprived of the administration of their property, nor vacant inheritances, nor taxes, contributions or imposts. It belongs to neither of the three classes of possessory actions, nor interdicts of possession; it is not the denouncement of a new work, nor a proceeding called a retraction, nor a case of bankruptcy, to which it was endeavored to be assimilated upon the argument; it has no relation to inventories of the estates of deceased persons, nor to the division of any inheritance between heirs, legatees, or devisees. It must fall, if it may be brought within any of the exceptions, under the general terms of that clause of the statute, which together with inventories and division of inheritances, also excepts "other urgent cases of the like nature." We should think that it might properly arrange itself under these general words, were it not for the clause immediately succeeding, which requires *conciliacion* previous to preferring a formal petition, which may have the effect of occasioning a litigated suit, and in case where a party has to seek by process of law the payment of a debt, even though the claim be based upon a contract of record. But in order to attain the end prayed for in the bill of complaint, it was necessary that a formal petition should be filed, which might have the effect of giving rise, and which has actually given rise, to a litigated suit.

It is to be observed that, with the exception of those cases relating to ecclesiastical matters, the public revenues either of cities or of towns, and certain other subjects of a political

character, and affecting the public welfare, all of which stand upon peculiar grounds of their own, the cases in which the preliminary effort at *conciliacion* is dispensed with, are those in which some step is necessary to be immediately taken, in order to protect temporarily the rights of the party complaining, or to prevent some injury threatened to his property; but that in none of the cases are the claims of the parties to the subject-matter in contest finally and absolutely adjusted. They are all in the nature of incipient or introductory proceedings for the purpose of procuring from the court an interlocutory order or decree, determining the temporary possession, control, or situation of the property, previous to the parties entering upon a full and formal investigation of their rights concerning it.

Thus the summary and very summary interdicts of possession are instituted in order to enable the party complaining to acquire, retain or recover simply the possession of the thing in controversy, until the title to it can be settled finally by the adjudication of the court in an ordinary suit: 1 Feb. Mej. 351; 4 Id. 272; Tapia's For. Prac. 233, 234, Ed. 1829. They partake somewhat of the nature of injunctions in courts of equity, and are applied to similar purposes, that is to say, to restrain the undue exercise of rights, to prevent threatened wrongs, to restore violated possessions and to secure the peaceable and quiet enjoyment of property: 2 Story's Eq. Juris. 201 to 204. The denouncement of a new work, being a proceeding to restrain the erection of some new work, as, for instance, a building which may, if completed, injuriously affect the property of the complainant, is of a character similar to the interdicts of possession: 4 Feb. Mej. 277 *et seq.*; Escriche Dic. Title "*Denuncia de Obra Nueva*," p. 185. And in the case of retraction, or the rescinding of a sale upon the claim of the plaintiff to be allowed to take the property at the same price for which it was sold to a third person, although certain steps may be taken for the security of the property previous to *conciliacion*, yet, if the vendee, on his appearance before the judge, resists the claim of the plaintiff, then a litigated suit becomes necessary, which must be preceded by the trial of *conciliacion*: 3 Feb. Mej. 75. It follows from the above view of the nature of those cases which do

not require attempts at *conciliacion*, that suits known in the American system of jurisprudence as injunction suits, not praying for relief further than to restrain the defendant from the performance of a specific act, would not, as a general thing require *conciliacion* under the Mexican system; and if the object of this suit had been simply to prevent the threatened sale of the property of the company, without praying for a final disposition and settlement of its affairs and distribution of its effects, we should have thought that it was one of those urgent cases contemplated by the statute in which *conciliacion* might have been dispensed with. But before any step could have been taken to obtain the extent of relief prayed for by this bill, we apprehend that it was an essential prerequisite that conciliatory measures should have been tried, within that portion of the statute which makes *conciliacion* necessary in those cases in which a formal petition is to be put in, which may occasion a litigated suit.

Conciliacion, then, having been necessary in this suit, under the Mexican statute, we come next to the second subdivision of the point under discussion, which is whether this case can claim any legal dispensation from the effects of that statute.

It is claimed that a certificate of the failure of *conciliacion* must be presented in order to confer jurisdiction upon the court. If this be so, the judgment appealed from is utterly null, and we know of nothing which can give it validity. The ground of nullity is assumed by many, if not most, of the writers upon the subject, but the latest authority which we have seen holds the reverse, and the views contained therein are satisfactory: 5 Tapia Feb. 215, 216, Ed. 1845. The proceedings, therefore, although irregular under the statute, are not void for want of jurisdiction; and the question then is, whether that irregularity may in any way be cured.

This question might, perhaps, be satisfactorily answered by saying, that since the acquisition of California by the Americans, the proceeding of *conciliacion* has, in all cases, been deemed a useless formality by the greater portion of the members of the bar, by the courts and by the people; that it has, in fact, passed into disuse and become obsolete. In Mexican jurisprudence, as in that of other countries,

custom is sometimes allowed not only to control, limit, modify and interpret the general rules of the system, but even to establish a rule in direct and palpable contravention of the positive, written law. It is the teaching of the books that custom may attain the force of law, not only when there is no law to the contrary, but when the effect of it is to overturn the previous law which stands in opposition to it—whence arises the maxim that there may be a custom without law, a custom contrary to law, and a custom according to law: Escriche, *Derecho Espanol*, 23, 24; Escriche, Dic. Title "*Costumbre*;" 1 Feb. Mej. 55 to 61.

But it is unnecessary to base our conclusion upon the ground of custom. Section 26 of the act of February 28, 1850, regulating appeals, authorizes this court to reverse, affirm or modify any judgment, order or determination appealed from, in whole or in part, and as to any or all of the parties, to grant new trials, and render such judgment as substantial justice shall require, without regard to formal or technical defects, errors or imperfections, not affecting the very right and justice of the case. Notwithstanding the importance which seems to be attached to the trial of *conciliacion* by Spanish and Mexican writers (see 5 Tapia Feb. 209, and 1 Prac. For. Mej. 72, *et seq.*, by Peña y Peña), and even conceding that it may operate beneficially in the nations for which it was originally designed, still, amongst the American people it can be looked upon in no other light than as a useless and dilatory formality, unattended by a single profitable result, and not affecting the substantial justice of any case. Viewing, then, the absence of a certificate of the failure of *conciliacion* as a mere formal and technical defect, error or imperfection, we feel ourselves fully justified in overruling the objection founded upon it. Nor does it strike us that there is any force in the argument that the statute of February 28th ought not to be construed so as to give it a retroactive operation. As a general rule of statutory interpretation, it is undoubtedly true that a statute should be construed to operate upon the future, and not upon the past; but, with the exception of those cases which come within the purview of prohibitory clauses in State constitutions, or in the Constitution of the United States, we know of no case in which it is

not competent for a State legislature to give to a statute a retroactive effect; and it is the very scope and object of the statute of February 28th to provide for the decision upon appeal of cases which had been tried previous to its passage.

We have entered thus fully into an examination of the doctrine of *conciliacion*, and given our views of it at length, in order that the profession may understand that the objection for the want of conciliatory measures is, so far as the court is concerned, disposed of now, and, as we sincerely hope, forever.

The next point to be considered is as to parties. It is claimed by the counsel for the appellants that the bill should be dismissed for defect of parties. The general rule upon this subject is sometimes stated to be that all persons materially interested in the subject-matter of the suit ought to be made parties, and sometimes it is limited to those who are interested in the object of the suit. But whether the one definition or the other be adopted, in neither case is the rule founded on any positive and uniform principle, nor admits of being expounded by the application of any universal test. It can scarcely be said to be useful as a practical guide, for it is open to so many exceptions, and qualifications, and limitations, that the nature, extent and application of it can not be always clearly defined. The principle upon which these exceptions are founded is, that courts will not suffer the rule to be so applied as to defeat the very purposes of justice, if they can dispose of the merits of the case before them without prejudice to the rights or interests of other persons who are not parties, or if the circumstances of the case render the application of the rule impracticable: Story's Eq. Pl. Secs. 76, 77. One exception is where a person is beyond the jurisdiction of the court (Id. 78), which would apply, to some extent, to the case in hand, for it is conceded that some of the money shareholders of the company are not within the State. Another exception is, where the persons interested are numerous, and it would be impracticable to join them without almost interminable delays, and other inconveniences which would obstruct and probably defeat the purposes of justice; neither is the general rule adhered to in cases in which, con-

sistently with practical convenience, it is inapplicable, for then it would destroy the purposes for which it was established. Where the question is one of common or general interest, or where parties form a voluntary association for public or private purposes, the persons interested are commonly numerous, and any attempt to unite them all in the suit would be, even if practicable, exceedingly inconvenient, and would subject the proceedings to the danger of perpetual abatements and other impediments, arising from intermediate deaths or other accidents or changes of interest: Story's Eq. Pl., Secs. 93, 96, 97. Many adjudications, in which these principles have been applied and illustrated, are collected and arranged by Judge Story in his work on Equity Pleadings, the result of which is, that where the parties in interest are numerous, courts will allow a bill to be brought by some of them on behalf of themselves and others, taking care that there shall be a due representation of all substantial interests before the court; and no distinction is made whether the bill be filed by or against persons not members of the association, or by certain members against others of the same association. It is true that it has been held in some of the cases that where the bill seeks the dissolution of the company, all the members must be made parties, however numerous they may be; but this doctrine has been greatly qualified, if not positively overturned, in the more recent authorities; and the reasons against its application advanced by Judge Story (Eq. Pl., Secs. 134, 135), are so cogent and conclusive, that, even if express authority did not support us, we could not hesitate, in establishing a precedent in a new State, to declare that it receives our unqualified dissent. We would, in this respect, take for our guide the wisdom of Lord CORRENHAM, declared in *Taylor v. Salmon*, 4 Mylne & Craig's Rep. 134, that "it is the duty of the court to adapt its practice and course of proceeding as far as possible to the existing state of society, and to apply its jurisdiction to all those new cases, which, from the progress daily making in the affairs of men, must continually arise, and not, from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy." Upon the whole, the forty-eighth rule of the Supreme Court

of the United States, adopted in 1842, appears to furnish the correct rule for the government of cases of this nature, which is, that where the parties on either side are very numerous, and can not, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court, in its discretion, may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it.

Although the bill of complaint in the case before us does not expressly allege that it is filed on behalf of the plaintiffs and others claiming the same interest in the effects of the association, it appears, nevertheless, to be the scope of the bill to protect the rights, not only of the plaintiffs, but also of another numerous class of the stockholders, who are owners of what is termed the money shares; for the bill prays that the proceeds arising from the sale of the effects of the company may be divided among all the money shares, and the money shares alone. While, therefore, the plaintiffs may properly be deemed to represent the money stockholders, the defendants, who insist that the property of the company should be distributed among the money and the labor shares equally, may be regarded as peculiarly representing the labor shares; and thus all the substantial interests of all the members of the company are before the court. The persons interested in the subject-matter of the suit are numerous, and from the nature of the enterprise which was the object of the formation of the company, from the condition of the country and the ever-changing locations of people engaged in operations in the gold mines of California, it would be, if not utterly impracticable, productive of manifest inconvenience and oppressive delays, to require that all the members of the association should be brought into court before it would proceed to administer justice between any of them. We think that the bill ought not to be dismissed for defect of parties.

Before proceeding to the consideration of the other points raised, it becomes necessary to determine what effect should be given to the allegations of the answer. It is claimed by the counsel for the plaintiffs, that while the matters stated upon the knowledge of the defendants are to be taken as

true, those matters which rest upon information and belief are entitled to no weight. We understand the rule very differently. The case has been treated by both parties strictly as a chancery suit; the subject-matter is properly of chancery jurisdiction, the pleadings are formal chancery pleadings, and the cause was passed upon by the court below as a chancery cause and was argued as such in this court. The effect of the answer must therefore be governed by the rules of chancery practice, according to which, when a cause is heard on bill and answer, all the material allegations of the latter, whether upon knowledge, or upon information and belief, are to be assumed as true. There is, however, this qualification of the rule, that where facts and circumstances disclosed by the answer are wholly inconsistent with a general affirmation or denial contained therein, the former shall prevail over the latter. An answer is regarded, not merely as a response to the charges and interrogatories of the complaint, but as a pleading of the defendant, in which he may set up any matter of defense, whether within his knowledge or not, and consequently if such matter of defense is not to be taken as true when the cause is heard on bill and answer, then it would be in the power of the complainant to preclude the defendant from any defense not resting in his personal knowledge, by refusing to file a replication and setting the cause down for argument on bill and answer. But it is unnecessary to pursue the subject. The rule, as above stated, is founded in reason and is perfectly well settled.

With this view of the nature and effect of the answer, we are prepared to determine the question of forfeiture of the plaintiffs' shares of stock. The bill is filed by Peter Von Schmidt, Julius H. Von Schmidt, Thomas S. Holman and Lewis F. Newman. On the argument, nothing was said of Julius H. Von Schmidt, but it was said that two persons by the name of Holman had been expelled from the company. On looking at the names of the subscribers to the articles of association, we find Julius H. Von Schmidt, and but one Holman. There seems to be, in this respect, a discrepancy between the papers and the argument of counsel, which we can account for only upon the supposition that Julius H. Von Schmidt and Julius H. Holman are one and the same

person. We shall assume that they are, and if we are wrong, the error may be corrected on the application of counsel.

The case of Peter Von Schmidt differs from that of the other plaintiffs, and the latter all stand upon the same ground. We will first dispose of them. They were expelled from the company and their shares forfeited by virtue of the latter clause of article 22 of the articles of association, which declares that "any operative shareholder who shall, within three months after the arrival of the company in California, desert the company without leave, shall, in addition to his labor stock, forfeit his two shares of money stock." The only question under this is, whether these plaintiffs did desert the company without leave within three months after its arrival. The company arrived about the first day of September, from which date the three months would begin to run. Did, then, these plaintiffs thus desert within three months from the first day of September? They arrived here some three months previous to the rest of the company, and, after having proceeded to the mines, returned to San Francisco, where they engaged in business on their individual account, for the profits of which they refused to render any account to the company, notwithstanding one of the articles of association required every operative shareholder to devote his entire time and energies to promote the common interest. After the arrival of the company they exerted their efforts to break up and disorganize it, refused to labor for it when directed so to do, or to attend its meetings; refused to accompany a portion of the members who were ordered to proceed, and did proceed to the mines, in pursuance of the objects of the association, and openly declared that they no longer considered themselves members of the association, for they could make more money by leaving it and forfeiting their stock than by remaining in it as operative shareholders, and in addition thereto, endeavored to persuade other members to desert the company and co-operate with them in their disorganizing proceedings. Neither of them has contributed his labor or services in any shape to the company, but all of them have, of their own choice, been engaged in pursuits for their private benefit. These are the facts disclosed by the answer and which we must assume to be

true; and if they do not constitute a desertion of the company without leave within three months after its arrival, we can conceive of no state of facts which would amount to such desertion. With this view the company, upon due notice, resolved that these plaintiffs had deserted the company, and had thereby forfeited both their labor and money stock. From that forfeiture the court can not relieve them: 2 Story's Eq. Juris. Secs. 1324, 1325.

How stands the case with Peter Von Schmidt? Contracts, like statutes, by reason of which a forfeiture is claimed to have accrued, should be construed strictly, and the facts urged in support of the forfeiture ought to be clear and explicit, and not be left to inference and argument. It appears that Von Schmidt was expelled from the company, and his stock forfeited before his arrival, for the answer states that notice could not be served upon him by reason of his continued absence; and absence without leave is made, by the articles of association, a different offense from desertion without leave, and is followed by different consequences. We do not see that the facts stated in the answer make out a case of desertion, without leave, on the part of Von Schmidt, within the exact period of three months after the arrival of the company in California. He is not, therefore, subject to the penalty imposed by the second clause of the 22d article, and consequently the forfeiture of his money stock is not warranted. The burden of the charge against him is of absence without leave. The first clause of the 22d article provides, "that any operative shareholder who shall absent himself during any portion of the time hereby limited, without leave, or providing a proper substitute, unless relieved by a vote of a majority of the operative shareholders for good cause assigned, shall forfeit his interest in the labor stock." It was the duty of Von Schmidt to have used due diligence in reaching California, and making proper allowance for his detention in New York to construct certain machines for the company, the facts warrant the conclusion that he did not use such diligence. His absence was, within the first clause of the 22d article, an absence without leave, which would warrant the resolution of the company forfeiting his labor stock. But the view we take of the other points in the case, renders it a matter of no mo-

ment whether his labor stock has been forfeited or not. There is another subject connected with the case of Von Schmidt, which it becomes necessary to notice. He agreed to complete for the company three gold washing machines for the sum of three thousand dollars, which was paid to him. The company was afterward obliged to pay two hundred dollars more, in order to get the machines finished. This latter sum must be deducted from the amount of Von Schmidt's portion on the final distribution of the effects of the company.

The next inquiry is as to the dissolution of the company. Was the company dissolved, as the bill alleges, before this suit was commenced? The answer positively denies that the company has declared a dissolution or intended to do so, or that a dissolution has been resolved upon or has in fact taken place. At the same time it admits that an "adjournment" has been made to the first day of September next; that all the property of the company has been sold, and that instructions have been given to the defendants to distribute the proceeds of the sale amongst the shareholders. It is evident that the members of the company have done all in their power to dissolve it, and yet they have been unable to accomplish their object. By the first article of association, the subscribers agree to associate themselves for the purpose of prosecuting the business of mining in California, from the first day of January, 1849, until the first day of October, 1853. By article 27, "all the shareholders mutually agree, that the company shall not be dissolved before the expiration of the term above limited, unless the enterprise be fairly tried and prove unprofitable; nor without the unanimous consent of the operative shareholders;" and further, that "in case the operative shareholders shall, at any time after one year from their arrival in California, determine that said enterprise can not be successfully or profitably carried on, then, but not otherwise, they may by an unanimous vote declare the dissolution of the company." This company belongs to the class of joint stock associations rather than to that of ordinary partnerships, and it is therefore unnecessary to discuss the mooted point whether one partner, without the consent of the others, has the right to dissolve a partnership formed for a limited period

(see Collyer on Part. Ed. 1848, p. 103, and note; Story on Part. Secs. 275, 276, and 3 Kent's Comm. 55), for, conceding the affirmative of the question, it by no means follows that the same rule would be properly applied to companies like the one under consideration, although the principles which control the one class, are, as a general thing, applicable to the other. Under the articles of association, the company had no power to declare a dissolution at any time before the first day of October, 1853, except by the unanimous vote of the operative shareholders; and even an unanimous vote could not effect this object until after the expiration of one year from the time of the arrival in California. We say *under* the articles of association; but these, like any other contract, might be canceled by the mutual agreement to that effect of all the parties: Story on Part. Sec. 266, *et seq.* No such agreement appears to have been made by all the parties, and consequently no dissolution had taken place at the time the suit was brought.

The question then is, ought the court to decree a dissolution? The bill contains no distinct prayer for such relief; it, however, proceeds upon the hypothesis that the company had already been legally dissolved, and seeks to have the property sold, and the avails distributed. This amounts in substance to a prayer for a dissolution; and in disposing of cases belonging to the former order of things, we are directed to overlook informalities. The bill alleges that it had been found impracticable to keep the company together—the answer does not deny it—and we are convinced of its truth. The successful prosecution of gold mining at the present time, under such an organization as is prescribed by these articles of association, appears to us to be an impracticability and a delusion, and in such event it is proper for courts to interfere and decree a dissolution: Story on Part. Sec. 390. Besides, the desire of the members is sufficiently indicated, and being in accordance with the interests of all concerned, ought not to be thwarted.

We come now to the last point of discussion. How shall the effects of the company be divided? Amongst the money shares alone, or amongst the money and labor shares equally? In order to determine this, we must endeavor to ascertain the

intention of the parties at the time when they formed this association in the city of New York. The contingency of a dissolution before the expiration of one year not having been contemplated, the articles of association contain no provision as to distribution in case of the occurrence of such an event. It is true that article nineteen directs the manner in which the division shall take place, in case the company shall determine to dissolve at the end of the period limited in the articles, "or at any other time." But this last clause must be construed in connection with article twenty-seven, which expressly prohibits a dissolution until after the expiration of one year, and can be applied only to the period intervening between the expiration of the first year and the end of the entire term. It was the intention, therefore, that the operative shareholders should render their services to the company for at least one year, in compensation for which they are each allowed eight shares of stock—an allowance which it is impossible to conceive was intended to be made to the operative shareholders merely for superintending the transportation of the effects of the company to California, and immediately selling them. This would be an enormous percentage for factor's commissions. So far, then, as the intention can be gathered from the articles of association, the performance of at least one year's services seems to have been made a condition precedent to the right of the operative shareholders to claim, upon the distribution of the effects of the company consequent upon a dissolution, a dividend upon their labor shares. And this construction is in accordance with the equity of the case. The operative shareholders have consumed some sixteen thousand dollars of the cash capital paid in, in defraying their expenses hither, and we deem this an ample equivalent for all the labor they have performed. The distribution must, therefore, be made upon the money shares alone.

The sole remaining question is as to costs. These should be paid out of the fund. And as, according to the view above taken, the company could not be legally dissolved except by the decree of a competent court; and as the filing of the bill was, therefore, for the mutual benefit of all the members, the expense of the proceeding ought not to be sustained by a few

of them alone. A counsel fee will be allowed, in the discretion of the district court, not exceeding three hundred dollars on each side.

A decree must be entered dissolving the company as of the date when the judgment appealed from was rendered, January 24, 1850. The receiver appointed by the court below will proceed, under the direction of the district court, to sell at public auction all the effects of the company, if there be any remaining unsold, and out of the moneys now in his hands, and which may come into his hands, will pay the costs of the suit and the counsel fees as above directed, and will then make a *pro rata* distribution of the balance of the fund amongst all the money shareholders, with the exception of the two Holmans and Newinan, and deducting two hundred dollars from the amount which would otherwise be payable to Peter Von Schmidt. Either party will apply to the district court for any order necessary to carry this decree into execution.

Ordered accordingly.

DUTCH FLAT WATER CO. v. MOONEY ET AL.

(12 California, 534. Supreme Court, 1859.)

¹**Pleading forfeiture under district rules.** An answer in ejectment averring that whatever right plaintiffs may have had, was forfeited by non-compliance with the rules of the diggings is insufficient in not setting forth the rules specifically.

Forfeiture, a legal conclusion. The averment of forfeiture is the averment of a legal conclusion upon which no issue can be taken; the facts upon which the forfeiture was based should be stated.

²**Query, as to retroactive district rules.** The mode of acquiring, and the extent of a claim, may be settled by district rules, but *query*—to what extent can the adoption of new rules, or the abrogation of old ones, affect title once acquired?

Appeal from the Eleventh District, County of Placer.

The facts sufficiently appear in the opinion of the court.

¹ See *Colman v. Clements*, 5 M. R. 247; *Morenhaut v. Wilson*. 1 M. R. 53; need not be pleaded at all: *Steele v. Gold Co.* 1 West C. R. 363.

² *McGarrity v. Byington*, 2 M. R. 311.

B. F. MYERS, for appellant.

M. E. MILLS, for respondent.

BALDWIN, J., delivered the opinion of the court, FIELD, J., concurring.

Ejectment for mining claims. Defendant answered, averring that the plaintiff had lost whatever right he had by a failure to comply with the rules, regulations and customs of the mining district. To this loose and general allegation the defendant demurred. The court overruled the demurrer. The parties are entitled to a definite issue upon which the case can be intelligently tried. The object of the pleading is to apprise the adverse party of the distinct subject-matter of averment or defense intended to be relied on. If the matter itself be good—which is not a little questionable—the manner of its statement is so loose and vague that no purpose of a pleading is subserved by it; for what were these regulations or customs—how many—how violated—when—under what circumstances? The general allegation of forfeiture is a legal conclusion upon which no issue can be taken. The facts must be stated so as to enable the court to see whether the forfeiture did accrue:

We do not decide the question as to the power of a mining district to pass a valid regulation declaring the tenure of this species of property to be different from that created by the general law. The act of the legislature giving effect to these local regulations, qualifies the power by providing that the rules so passed shall not be inconsistent with the constitution or laws of the State. We see no inconsistency in holding that the mode of acquiring and the extent of the claim, shall be according to these local rules; but when a right of property shall have attached, it may be more difficult to maintain that it can be divested by a rule or regulation, when the rule opposes the general law fixing the tenure.

It is true that the right coming entirely from possession may be lost by an abandonment of the possession, and the law determines what shall be or prove an abandonment; but the question is, can the local regulation alter this general principle, either by creating a new and arbitrary rule, or abrogating

the old ones? As this is an important matter, and the question has not been fully argued, we reserve a decision of it. For the errors assigned, the judgment is reversed and cause remanded.

¹McKNIGHT ET AL. v. KREUTZ.

(51 Pennsylvania State, 232. Supreme Court, 1866.)

²**Condition distinguished from covenant.** A coal lease contained a provision that the lessee should do no injury to the surface nor spoil the coal itself, the lessor reserving the right to send an expert into the mine to see in what manner the business was therein done: *Held*, not a condition for breach of which lessors might enter, but a covenant for breach of which lessee was liable in damages.

Forfeiture not favored. Conditions that work forfeitures are not favorites of the law, and to make a provision such, it must be manifested by a clear expression of intention.

Expressio unius, exclusio alterius. Where, in a lease, causes of forfeiture are specified, it is not to be inferred that there are other grounds of forfeiture, not declared to be such.

³**Burden of proof.** In ejectment by lessee against lessors who have entered for breach of condition the burden of proof is upon the lessors to prove the forfeiture.

Payment of rent. A lease required that the lessee should make sworn monthly returns of coal mined, and pay the rent monthly. There was no evidence of such returns, and evidence of only three payments of rent: *Held*, that the law concluded that no returns were made, and that other rent was not paid.

Entry presumed to be for breach, where breach existed. The lessee agreed to mine 72,000 bushels each year, to pay a stipulated sum for each 100 bushels and to make monthly returns; if he neglected to comply with the covenants for payment, lessors might determine the lease. The lessee failed in these payments, and the lessors resumed possession: *Held*, that the possession must be presumed to have been in virtue of their right to take possession in the absence of proof to the contrary, and that the court erred in submitting the question of waiver of plaintiff's right to the jury.

⁴**Delay, held no waiver of forfeiture.** The court below charged that "If the lessee did not pay for all the coal actually taken out, * * and if the lessors let it stand over without saying or doing anything to enforce

¹ Same case on second writ of error, *post* 314.

² *Adams v. Ore Knob Co.*, 3 M. R. 183.

³ *Oreamuho v. Uncle Sam Co.*, 1 M. R. 32.

⁴ *Clark v. Jones*, 1 Denio 516; 43 Am. Dec. 706 and note.

a compliance or notice of an intention to do so for more than two years, the lessee might conclude that they did not intend to insist on a forfeiture, and, if so, their remedy would be against him personally for rent in arrear": *Held*, that the exception thereto should have been sustained (without specification of the particular error).

The writ issued March 3, 1864, and July 15, 1865, a *nol. pros.* was entered as to H. Burgwin.

On the 21st of January, 1861, the heirs of James Ormsby and Krentz entered into an agreement under seal, to let to Krentz all the "coals being in and under a piece of land," described in the agreement, "for four years from the 1st of April then next, Krentz to have the right to open the coal pit where it had been theretofore, and use as much ground as necessary for digging, taking out, etc., the coal, and generally * * * carrying on said business;" also right to erect on grounds near the pit's mouth, a platform to put coal on; also to fill up part of a run "large enough to turn wagons thereon," but to make culverts, etc., so as not to stop the water; Krentz to take as much coal as he chooses, not less than seventy-two thousand bushels per annum; not to injure the surface of the land, nor spoil the coal; the lessors reserving power, in order to carry this condition into effect, to send from time to time one expert into the pit to examine and to get his approval, and also reserving to the lessors the use of the surface of the land, Krentz to pay seventy-five cents for every hundred bushels of coal at the end of each month, and then produce a sworn statement of the amount, and "if Krentz should neglect or fail to comply with the conditions now recited in regard to payment for said coal, parties of the first part shall have full power to dissolve, terminate and annul this article of agreement or lease entirely.

"In case if the coal under said land should be all taken out before the expiration of the four years agreed upon by the parties, of course the present lease contract shall be terminated and dissolved."

The lessors had the mine examined by two experts, in the presence of Krentz. They made this statement dated October 14, 1861:

"We are both decidedly of opinion that no more coal can be taken from said mine without serious danger and almost certainty of letting in the surface. There is no coal there ex-

cept in pillars, and they can not be worked any more with safety. The water entry which drains this coal, the pit worked by McCormick, and also the Ormsby coal, is now in great danger of being blocked up by the pillars or walls giving way, where Krentz has taken away the coal, leaving them insufficient."

On the 15th and 26th of July and 21st of September, 1861, Krentz paid rent amounting in the whole to \$43, and ceased working the pit in October of the same year. There was no evidence that Krentz furnished sworn monthly statements, or that he paid any more rent than that above stated. The lessors entered for condition broken.

Under the charge of the court (HAMPTON, P. J.), there was a verdict for the plaintiff.

The defendants' points and the ruling of the court below will sufficiently appear by the specifications of error following:

1. The court erred in rejecting the defendants' offer in the following bill of exceptions:

"Henry Gilleland sworn: I went into the pit several times and examined the manner in which the mining was carried on. Krentz was with me once; I went there at the request of Mr. Burgwin; I was engaged as superintendent of Ormsby Coal Works for a number of years; Krentz had told me before that he was about leasing the coal works, or had leased them; he said I was to superintend the works. Witness looks at paper with affidavit dated October 15, 1861, and says: 'I signed and swore to that paper in connection with Mr. Sankey, and gave it to Mr. Burgwin.' "

Defendants offered the paper referred to by witness (the statement above mentioned).

The plaintiff objected that so far as it refers to Mr. Sankey, it is incompetent; and as to the witness he is now on the stand, and competent to give evidence as to the facts therein contained, and while he may refresh his memory by the contents of the paper, it is incompetent as an independent piece of evidence.

By the court: "Whether the paper would or would not be competent as secondary evidence in case of the death or absence of the witness, it is not necessary now to decide. I

am of opinion, however, that the testimony of the witness in open court as to the truth of the facts therein contained, after refreshing his memory, is the best evidence, and will tend more clearly to promote truth and justice than the statements it contains by itself could possibly do. The offer rejected."

2. The court erred in rejecting the defendants' offer in the following bill of exceptions:

"The defendants offered to prove by the witness (Gilleland) that the plaintiff, at the time he examined the mine, was carrying on his work in such a way, by taking out ribs and pillars of coal, as greatly to injure the surface by letting it in, and such danger was then imminent, and would be irremediable."

Plaintiff objected for the reason that it is irrelevant and improper; that the discretion by the lease is left to the plaintiff as to working the coal in the mines so as not to injure the surface; and that not having injured the surface, the opinion of the witness is immaterial and improper.

3. The court erred in rejecting the defendants' offer of testimony in the following bill of exceptions:

"Defendants' counsel now proposes to ask the witness (Gilleland) whether Kreutz was carrying on the digging of the coal in such manner as to meet his approval in regard to the injury which he might or might not do to the surface of the land, and whether such approval or non-approval was communicated to the lessors. This for the purpose of showing that the lessee had not complied with the condition that he was not to injure the surface of the land, and to show a right in the lessors to terminate the lease for breach of condition.

4. The court erred in refusing to charge as requested in defendants' first point, viz.:

"That by the proper construction of this lease, plaintiff held his mining right upon condition that he should so exercise this right as not to injure or endanger the surface land, or obstruct the watercourse referred to."

5. In not charging as requested in defendants' fourth point:

"That plaintiff is not entitled to recover in this suit without proving to the satisfaction of the jury a substantial per-

formance, upon his part, of the affirmative conditions upon which he held his lease, or a sufficient legal excuse for non-performance."

6. In not charging as requested in defendants' fifth point:

"That as the lessors were, by the lease, to retain possession of the surface land, no entry or claim of forfeiture was necessary on their part to avoid the lease upon breach of condition by the lessee; but the lease became by such breach, *ipso facto* void, or at all events became so upon proof of any act of lessors evincive of an intention so to treat it."

7. In not charging as requested in defendants' sixth point:

"That no entry or claim of forfeiture by lessors was necessary in order to annul or terminate this lease, should it be shown that the right to do so had accrued to them under its provisions."

8. In not charging as requested in defendants' eighth point:

"That a discontinuance of mining operations by plaintiff from October, 1861, to March, 1864, unless a sufficient legal excuse be shown, worked a forfeiture of the lease."

9. In not charging as requested in defendants' twelfth point:

"That plaintiff having once entered and possessed himself of the premises, the lessors being afterward, at the service of this writ, found in peaceable possession, and that possession being consistent with the provisions of the lease, viz., that the lease should terminate before the end of four years, in case all the coal were then taken out, the jury should presume, unless the contrary be proved, that the lease had thus terminated, and that lessor's possession was lawful."

10. In charging:

"It is not shown that he (Krentz) rendered monthly accounts, sworn to, as provided in the lease. He paid money, however, for coal rent, which was received as such without anything being said about the sworn returns; and if you believe from this evidence the lessors intended to waive their right to receive sworn returns, and did so waive their right, then they could not afterward declare the contract dissolved, without giving notice to the lessee of their intention to do so."

11. In charging:

"If the lessee did not pay for all the coal actually taken

out from month to month, in accordance with the terms of the lease, and if the lessors let it stand over without anything being said or done to enforce a compliance, or notice of an intention to do so for a period of more than two years, viz., from the fall of 1861 to the spring of 1864, he might conclude that they did not intend to insist on a forfeiture of the lease, and enter for condition broken; and if that were so, their remedy would be against him personally for the rent in arrear."

12. In charging,

"The burden of proof to show that the lessee had violated one or both these conditions (first, as regards sworn returns and payments; second, as regards the exhausting of all the coal) before the lessors entered, lies on them."

H. BURGWIN, for plaintiff in error.—Was the provision in the lease, that the lessee should not injure the surface or spoil the coal, a condition on which the lessee held the mining right? The lease called it a "condition," and it was eminently proper that there should be such a condition. The work was out of sight of the lessee, and the surface far more valuable than the coal, and it could not have been in the contemplation of the lessors, if the land was injured, that they should look for damages to an irresponsible party. Why employ an expert if they could not act on his report?

To lay on the lessors to prove a breach as to the monthly returns and payments of rent, would require them to prove a negative. If the lessors were plaintiffs all that would be required of them would be to show the lease, and call on the lessee to show payment; much more ought this to be so when the lessee is the plaintiff.

When land is held on condition, on breach of condition the title is *ipso facto* void without entry or claim: *Hamilton v. Elliot*, 5 S. & R. 375; *Davis v. Moss*, 2 Wright, 246; *Shaeffer v. Shaeffer*, 1 Id. 525; Co. Litt. 214 b.

The lessee being in default could not take advantage of it, nor set up the lessor's forbearance as a waiver. In the cases cited long periods elapsed before any intention was shown to take advantage of the breach.

Waiver must be established by an unequivocal act. The lessors being in possession, no act was necessary: Co. Litt.

218. But if there was a waiver for rent due up to October, 1861, it is no waiver of forfeiture for that due afterward: See *Doe v. Bliss*, 4 Taunt. 735; *Blucher v. Smith*, 13 Wend. 534; *Jackson v. Allen*, 3 Cow. 220; *Kenrick v. Smick*, 7 W. & S. 41. On breach of condition a lease is *ipso facto* void, and a subsequent recognition can not give it continuance: Co. Litt. 215 a. The cessation of mining for two and a half years is a forfeiture, not merely evidence of it.

The lessors being found in possession at the end of three years, and this being consistent with the provision terminating the lease when the coal was exhausted, the presumption is, the coal was exhausted; besides, the evidence went to show that it was so.

WOODS, for defendant in error.—(The reporter received no paper book of defendant in error.)

The opinion of the court was delivered, January 8, 1866, by STRONG, J.

A very large number of errors have been assigned in this case, most of which are without any substantial foundation. A considerable portion of them rest upon the assumption that the estate demised to the plaintiff below was upon condition that he should so exercise his right as not to injure or endanger the surface of the land or obstruct the watercourse. In our opinion, however, the assumption is not well made. There is nothing in the words of the lease that can by any just construction be regarded as making the tenure of the lease dependent upon his compliance with any other covenants than those which relate to the rent. The utmost that can be made of the stipulation that the lessee should dig coal in such a manner as to do no injury to the surface of the land, and not spoil the coal itself, is that it constitutes a covenant the breach of which may subject the lessee to liability for damages, but not to forfeiture of his estate. Conditions that work forfeitures are not favorites of the law, and nothing less than a clear expression of intention that a provision shall be such, will make it a condition upon which the continuance of an estate granted depends. Here there is no such intention apparent. True, in providing a mode by which the stipula-

tion might be enforced, the parties speak of it as a condition, but it is evident they use the word in a sense in which it is often used, that of understanding, agreement or covenant. That it was not intended to be a divestiture of the estate of the lessee, is plain from the fact that there is no declaration that doing injury to the surface or spoiling the coal should work a forfeiture, while in regard to breaches of other covenants there is such a declaration. Having expressed for what causes a forfeiture might be claimed, it is not to be inferred that there are any grounds of forfeiture not declared to be such. We hold then that the estate of the lessee was not made dependent for its continued existence upon his compliance with the requirement that the surface of the land should not be injured or endangered. Hence there was no error in refusing to affirm the defendant's first point and none in rejecting the evidence described in the first, second and third bills of exceptions. The evidence offered was immaterial to the issue, if not inadmissible for other reasons.

Nor can the fifth and twelfth assignments of error be sustained. The lease gave to the plaintiff below the right of possession primarily for four years. If by non-compliance with the conditions of the demise, he had forfeited the term after it had been vested in him, that was a fact to be proved by the lessors who assert the forfeiture. The question as to the mode of proof of non-compliance, or as to what was sufficient proof of it is a different matter. To that the maxim "*de non apparentibus et non existentibus eadem est ratio vel lex*," may be applied. The court was, however, not asked to instruct the jury what was evidence of non-payment of the rent, or what was evidence of failure to render sworn returns of the quantity of coal taken out each month. There seems to have been no evidence of any such returns, and therefore the law concludes none were made, nor was there evidence of any other payments of rent than those of July 15, July 26 and September 21, 1861, and therefore no others were made. Nor could the jury under the instructions of the court, have found any other or that monthly statements were furnished, and we can not presume that they did.

But the court should have affirmed in substance the sixth, seventh and eighth points presented by the defendants. The

lessee bound himself to dig and remove from the land at least 72,000 bushels per annum, that is, each year of the term, and to pay for the same at the rate of seventy-five cents for every hundred bushels of coal taken out, and to render sworn monthly returns, by which the rent due might be determined. And it was expressly stipulated that if he neglected or failed to comply with the covenants for payment for the coal, the lessors should be at liberty to determine the lease, and treat it as void. That he did not make such sworn statement, and that he did not annually take out and pay for seventy-two thousand bushels of coal, was conclusively established, and that the lessors had resumed possession was admitted by the ejectment. The possession of the lessors, in absence of proof to the contrary, should have been presumed to have been in virtue of their right to retake the possession and terminate the lease; and there was error in submitting to the jury to find that there had been a waiver of the right of the lessors to "dissolve, terminate and annul the lease." Conceding that the receipt of money on account of rent in the months of July and September, 1861, was a waiver of the right to insist upon sworn statements of the quantity of coal removed, which is probably more than ought to be conceded, there was no evidence of any waiver of the right of the lessors to insist upon the payment for seventy-two thousand bushels per annum, each year of the term. Yet from 1861 to 1864 the lessee paid nothing. He mined no coal; he paid for none. The lessors had a right, therefore, to treat the lease as a nullity, and their resuming the possession was thus treating it. So the jury should have been instructed, and they should not have been permitted to find that the rights of the lessors to resume possession in default of such payment had been waived.

It is probable the attention of the court was directed mainly to the default of the lessee in furnishing the sworn statement required by the lease. This was but a part of his duty. Though he may have been relieved from that, he was not relieved from the obligation to pay for seventy-two thousand bushels annually, without which payment the lessors had the right to declare the lease void. This it must be presumed they did.

These observations dispense with the necessity of noticing in detail the remaining assignments of error. The eleventh is sustained, and the instruction of the court to which exception is taken in the tenth, unless it was intended as applicable only to the fifteenth, for want of sworn statements requires qualifications. Under the evidence as it was presented, the plaintiff was not entitled to recover.

The judgment is reversed and a venire de novo awarded.

KREUTZ V. MCKNIGHT ET AL.

(53 Pennsylvania State, 319. Supreme Court, 1867.)

¹ Laches of ousted tenant. A coal lease provided that in default of payment of monthly rents lessors should have full power to dissolve the lease. After working several months, mostly in fixing and cleaning out the mine, which was an old one, making partial payments of rent, but without the monthly returns which were not demanded, he was ousted at night by breaking the lock, and the entry, in this manner, by one of the defendants under another lease. He delayed bringing suit for over two years: *Held*, that this was "not the way" to enforce the forfeiture; but that the delay in bringing suit was fatal to plaintiff's recovery.

Ejectment by ousted lessee. A lessee, out of possession, can not recover in ejectment without showing performance or an offer to perform his covenants.

Landlord's wrong condoned by tenant's laches. Another having intruded into the possession, the lessee did not bring suit for two years and a half. *Held*, that this was an abandonment of the term, and obviated the necessity for a demand of rent and a formal declaration of forfeiture.

Error to the District Court of Allegheny County.

This was an action of ejectment by Lewis Krentz against William McKnight and Sarah, his wife, Jane Morgan and Oliver Ormsby, heirs of Jane Ormsby, deceased, H. Burgwin and John Hartman, for ten acres of land. The writ was

¹ See same case, *ante* 305. It will be noticed that the two opinions are based on entirely different premises. It was evidently a case of oppression and hardship, and the suggestion in the latter opinion as to default of defendant in not keeping his covenants after he had been forcibly ousted by his landlord, is certainly more ironical than just.

served March 5, 1864, on the McKnights, Burgwin and Hartman, and returned "nihil" as to Mrs. Morgan and Ormsby.

The case was tried April 29, 1865, and a verdict found for the plaintiff; the defendants took a writ of error, and on the 16th of July, 1865, before the hearing in the Supreme Court, a *nolle prosequi* was entered as to Mr. Burgwin. The judgment was reversed by the Supreme Court (1 P. F. Smith, 232), and again tried in the district court, April 6 1866.

The plaintiff claimed possession under a lease from the heirs of Jane Ormsby, deceased, by H. Burgwin, their attorney in fact, dated January 21, 1861, by which they let to the plaintiff, for four years from the succeeding 1st of April, all the coal under a piece of land containing ten acres—the plaintiff to dig and take away as much coal as he might deem proper; but being bound to take away 72,000 bushels per annum, and pay for the coal at the rate of seventy-five cents per hundred bushels, "and to produce at the end of each month a statement in writing signed by him, and sworn to by him before any magistrate, showing the amount due to said parties of the first part at the rate aforementioned. But if Kreutz should fail to pay the sum due at the end of each month, in cash, he shall have the privilege of giving a note for such sum with sufficient security thereon, to be approved by H. Burgwin, and in such case parties of the first part shall have to wait for said money two months from the date of such note, with interest. If, however, Kreutz should neglect or fail to comply with the conditions now recited in regard to payment for said coal, parties of the first part shall have full power to dissolve, terminate and annul this article of agreement or lease entirely."

The plaintiff on the trial gave his lease in evidence, and gave evidence also that he worked in the mine four or five months (a large portion of which time was employed in cleaning and fixing up the mine, which was an old one), and got out some coal; that the pit was left on one night locked, and in the morning the door was found broken open, and Hartman, one of the defendants, was in possession of the mine, working it. There was no evidence that the plaintiff had pos-

session afterward. Plaintiff gave also in evidence a sworn return made to Mr. Burgwin, showing that up to September 21, 1861, he had taken out 6,064 bushels of coal; there was no evidence of any other return. He also gave in evidence receipts from Mr. Burgwin, dated July 15 and 26, and September 21, 1861, for payments for coal, amounting to \$43 in the whole; and proved that another person, in 1861, had offered to Mr. Burgwin to raise \$50 for plaintiff to pay for coal, "and go bail for whatever amount might be necessary."

After the plaintiff had closed his case, the court, on motion of defendant's counsel, directed a nonsuit to be entered. This was the error assigned.

R. WOODS and J. L. KÆTHEN, for plaintiff in error.

H. BURGWIN, Jr., for defendant in error.

The opinion of the court was delivered January 7, 1867, by WOODWARD, C. J.

If Kreutz had shown substantial performance of the conditions of the lease, or a *bona fide* attempt to perform them, we would hold the lessors to a very strict exercise of their right to "dissolve, terminate and annul" the lease. We do not think there was the necessary evidence of their exercise of this right. The putting another tenant on the premises without demand on or notice to Kreutz, was not the way to enforce the forfeiture.

But the infirmity of the plaintiff's case is, that there was an utter failure to show performance or offer of performance of his covenants. He was bound to take and pay for 72,000 bushels of coal per annum; but after September, 1861, only five months from the beginning of the term, he made no returns, and offered no payments or notes with security as the lease provided. His suit was brought 5th March, 1864, and in all that interval, between September, 1861, and March, 1864, two years and a half, there were no returns by the plaintiff, such as the lease stipulated for, and no attempt to comply with his covenants. If Hartman had intruded into the possession, he ought to have sued him promptly, for, as it was a term of only four years from the 1st of April, 1861, to suffer an intruder to hold possession two years and a half without

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question was to abandon the term altogether, and to obviate the necessity for a demand of the rent and a formal declaration of forfeiture. It would be an intolerable hardship to landlords, if tenants once in possession could allow themselves to be ousted by intruders for more than half the term—neither tenant nor intruder rendering the stipulated rent.

As the case was presented in the evidence, we think it was properly ruled in the court below, and the judgment is accordingly affirmed.

STOCKBRIDGE IRON CO. v. CONE IRON WORKS ET AL.

(102 Massachusetts, 80. Supreme Judicial Court, 1869.)

¹ Forfeiture of lease by neglect to operate. By lease for 999 years, premises were let under covenant to take therefrom from year to year, such quantities of ore as should be considered as improving the same in a good husband-like and thorough manner, and to pay royalty, with forfeiture for breach of either covenant: *Held*, that failure to work for sixteen months, during which period it would have been profitable to work the ore bed, was a breach of condition, for which, lessor or his assignee, might reenter and declare forfeiture.

Forfeiture not effected without entry—facts showing entry. There must be an entry or possession, with intent to hold the property for forfeiture. Lessees had abandoned the premises; plaintiffs had occupied the surface, cutting off lessees' access to the ore, and had let a portion of the mine to a third party and had notified sundry parties that they had entered for breach of condition: *Held*, that these facts authorized the finding that lessor had entered and determined the lease.

² Damages, lessor against trespasser. Lessor may recover for ore taken from demised premises by a trespasser, at least to the extent of the royalty he should have received from the lessee.

The measure of damages is the value of the ore as it lay in the bed, and not its value as increased by defendant's moving it; also the "damage done the real estate" (surface).

Agent not responsible to extent of principal. The agent of the works sued was made a party defendant to bill in equity for injunction against trespass by mining, and for account of ore taken; all the trespasses complained of were done by subordinates under him, and were for the sole benefit of the works: *Held*, that the bill should be dismissed as to him, but without costs.

¹ *Price v. Nicholas*, 4 Hughes, C. C. 616.

² See *Attersoll v. Stevens*, 1 Taunt. 182; *Post* MEASURE OF DAMAGES.

¹ **Inspection, with excavations and allowance for expense of the same.**

The bill charged the making of subterranean excavations across defendants' bounds into plaintiffs' adjoining ore bed, and prayed an inspection. The court appointed viewers with power to employ engineers and workmen, enter defendants' ground and workings, and drain and clear the same so far as necessary to ascertain the amount of ore taken, and do all acts reasonably necessary to ascertain the amount of mineral taken. The viewers actually obtained access to the trespassing drifts by a new excavation made from a shaft of plaintiffs' on plaintiffs' ground: *Held*, that if this were the cheaper mode of access, and reasonably necessary, it was within the terms of the order, and the expenses of the view, \$4,841.07, which had been advanced by plaintiffs, were allowed *with interest*, such sum including an allowance for the *use of plaintiffs' shaft* and machinery in making the excavations.

Tort, praying for relief in equity, by the owners of land in West Stockbridge against the Cone Iron Works, Franklin B. Cone and Robert Pomeroy, for injury to the plaintiffs' land, by digging a shaft on adjoining land occupied by the defendants, and thence digging and excavating drifts, caves and openings into and under the plaintiffs' land, and taking therefrom large quantities of iron and other ores. The plaintiffs alleged that the defendants concealed the injury, and prevented them from entering said shaft to ascertain its amount; sought to recover damages for the injury, and prayed for an injunction and discovery, and that the plaintiffs by their agents, or by proper officers appointed by the court, might have free access into the said shaft and any drifts and excavation accessible therefrom, in order to make a full survey of all the excavations into the plaintiffs' land complained of, and might be authorized to make all such surveys, explorations and discovery, and do all such acts as in the premises were rightful and proper to be made or done. Writ, dated December 28, 1867.

On motion of the plaintiffs the court passed an order appointing reviewers, and empowering them after hearing the parties, to appoint engineers, and direct the engineers and workmen employed by them to enter the shaft on the defendants' land, clear the water from said shaft by pumping or otherwise, examine all excavations and drifts leading therefrom toward and under the plaintiffs' land and clear the same as far as necessary to ascertain what iron or other mineral

¹ If there is any limit at all to the powers of a court in these matters we think it was reached in this case.

had been taken from the land of the plaintiffs and under the surface thereof, and to do all acts that might be reasonably necessary to be done to effect the purposes of the decree. The order further directed that the plaintiffs should advance and pay to the viewers all the money necessary to be expended in the work, and should pay the viewers for their reasonable charges and expenses, to be finally settled by the court.

After the viewers had made their examination, the case was referred to a master, who reported that the Cone Iron Works had trespassed on the plaintiffs' land and had taken ore therefrom; that Cone was the general agent of said works, and all the acts and trespasses committed by said works were done by subordinate agents acting under him, and inured wholly to the advantage of said works; and that Pomeroy had no part in any of the said acts or trespasses. The master, at the request of the parties, abstained from passing upon the question of concealment by the defendants, and upon the question of costs or of the liability for expenses of the view. The other facts found by him are stated in the opinion.

S. W. BOWERMAN and W. H. SWIFT, for the plaintiffs.

H. L. DAWES and T. P. PINGREE, for the defendants.

CHAPMAN, C. J.

The plaintiffs are the owners of a tract of land called the Leet farm, and formerly owned by Nathaniel Leet. It bounds easterly by land of the Cone Iron Works, the line being center of the Benton road, so called. In August, 1826, Leet, being then the owner of the farm, made a lease to Isaac Nicholson and Eli Richmond, for nine hundred and ninety-nine years, of the right of digging ore in a lot of land described by metes and bounds, and being a part of the farm bounding on the Benton road, and containing the Leet ore bed, so called; also the right of drawing and depositing the ore on the lot, and of ingress and egress thereon for the purpose aforesaid; yielding and paying therefor every year, half yearly, the sum of thirty-seven and one half cents for each and every ton of ore dug on the premises. The lessees covenanted to occupy and improve the ore bed in a proper manner, and dig and take therefrom, from year to year, such quantities of ore as

should be considered as improving the same in a good husband-like and thorough manner, and keep a true account of the ore they should dig, and for each and every ton of ore when the same should have been weighed and taken from the premises, to pay the sum named. They also covenanted to keep up the fences; and it was agreed that if the rent should be in arrears and unpaid for the space of three months, or if the lessee should "neglect to improve said ore bed in the manner above described," or underlet without the consent and approbation of the lessor, he might re-enter the premises, and again have, possess and enjoy them as of his first estate. The covenants of each party were made for themselves, their heirs and assigns.

Between the year 1865 and June 2, 1867, and long after the plaintiffs became owners of the title of Leet, the defendants sank a shaft on their land near the Benton road, and by means of excavations under ground obtained a large quantity of ore from the Leet ore bed, and from the farm northerly of the leased land. The report finds that this was not done willfully, but by gross negligence, and states the quantity and value of the ore thus taken. No question is raised as to the liability of the Cone Iron Works for the injury done to the plaintiffs' land not included in the lease; but it is contended that, as to the premises included in the lease, the plaintiffs have only a reversionary interest, and can not maintain this action.

The master finds, subject to the opinion of the court, that, at the time of the taking of the ore by the defendants, the plaintiffs were the owners of the Leet ore bed, subject only to a lease of a part of the same which they had made to one Pierson, and that they were in possession of the lot by their tenants. This implies that the lease to Nicholson and Richmond had been terminated. The plaintiffs contend that the lessees and their assigns forfeited the estate by breach of the condition contained in the lease, and that the plaintiffs had a right to terminate it, and have done so. The defendants, on the other hand, contend that no one but the lessor and his heirs had power to take advantage of a breach of the condition and terminate the estate for forfeiture; and even if the plaintiffs had the right, they have done no act that is sufficient to terminate it.

It is true that, by the common law, only the grantor or his heirs or executor could enter for breach of a condition: *Comyn, Landl. and Ten.* 285; *Rice v. Boston & Worcester Railroad Co.*, 12 Allen, 141. But by the St. of 32 Hen. VIII, c. 34, an assignee of a lessor's estate may have the same remedy. He can not take advantage of a breach of every condition; for the statute is held to refer only to conditions to do anything incident to the reversion, and not to conditions to do or not to do collateral acts: *Comyn, Landl. and Ten.* 286. The distinction is thus expressed in *Co. Lit.* 215 b.: "The grantees or assignees shall not take the benefit of every forfeiture by force of a condition, but only of such conditions as either are incident to the reversion, as rents, or for the benefit of the estate, as for not doing of waste, for keeping the houses in reparations, for making of fences, scouring of ditches, for preserving of woods, or such like; and not for the payment of any sum in gross, delivery of corn, wood or the like; so as other forfeiture shall be taken for other forfeitures, like to those examples which were there put (that is, in the statute) of payment of rent, and not doing of waste, which are for the benefit of the reversion." Underletting without consent has been held to be not within the statute.

It was not contended at the argument that the lease was forfeited for underletting without consent, though this ground was taken at an earlier stage of the case; but it is contended that the lease became forfeited by a breach of the covenants respecting the payments of rent.

The report finds that from 1854, until May, 1867, there was no ore taken from the Leet ore bed, and no mining operations were carried on thereon except by the defendant corporation, as hereafter stated, which was not a taking under the lease, but was tortious. It would not have been profitable to mine the ore bed at the stipulated royalty during any part of the time from 1854 to the end of 1861; but from January, 1862, to May, 1863, it would have been profitable.

The terms of the lease were unlike those of the lease stated in *Jones v. Shears*, 7 C. & P. 346, cited by the defendant's counsel. The lessees in that case were to work the mine so long as it was fairly workable; and it was held that under those words they were not obliged to work at a dead loss.

But the lease in this case required the lessees to dig and take the ore and pay the royalty from year to year, without making any reference to profit or loss, and the rent was payable semi-annually. The improvement of the mine in a good husband-like and thorough manner evidently refers to the manner of carrying on the business, so as to secure a reasonable rent. And certainly the neglect to carry it on from January, 1862, to May, 1863, while it would have been profitable to the lessees, and thereby depriving the landlord of all rent, was such a breach of condition as subjected the estate to forfeiture.

But it is contended that, even if this were so, the plaintiffs have done nothing to regain the estate.

After the action of *ejectione firmæ* was superseded by the action of ejectment in England, an actual entry for forfeiture was treated as a mere matter of form, and became unnecessary. In order to be admitted to defend, the tenant was obliged to confess it in his pleadings by admitting the fictitious statement contained in the declaration. But in this commonwealth some act is held to be necessary. There must be an entry or possession with intent to hold the property for forfeiture; and there must be some manifestation of this intent: *Stone v. Ellis*, 9 Cush 95; *Hubbard v. Hubbard*, 97 Mass. 188. The facts found by the master are sufficient to authorize him to find both the possession and the expression of the intent. The lessees abandoned the possession, and the plaintiffs entered and occupied the surface of the ground by their tenants, thus cutting off the lessees' access to the ore, and made a written lease of a portion of the mine to Pierson. In May, 1863, their agent delivered to an agent or one of the owners of the Lenox Iron Company, and to the bookkeeper in the office of the Richmond Iron Company, a notice that the plaintiffs had entered for a breach of the conditions of the lease and to terminate the same. These companies had worked the mine previously to 1854. It does not appear whether other parties had ever worked it under the lease, but since 1854 no one had worked it. No parties appear to have worked it down to the present time, as lessees, and no parties except the Cone Iron Works have claimed title as lessees; and their only claim of title is under a lease from several of the heirs of Eli Richmond, dated June 24, 1867, after the defend-

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ants had ceased to take ore from the mine, and including three fourteenth parts of the lessees' interest. The court are of opinion that the finding of the master was warranted by the facts proved.

The lease to Pierson constitutes no objection to the present action; for the value of the ore per ton, as found by the master, is less than the royalty which the plaintiffs were to receive from Pierson. The injury to their reversionary interest is, therefore, at least equal to the damages which they will recover under the finding.

The result to which we are thus led is, that the plaintiffs are entitled to recover against the Cone Iron Works, on the ground that the taking of the ore and the injury done to the property were tortious; and they are also entitled to have the injunction made perpetual. The value of the ore is to be estimated as it lay in the bed, and not as it was after the defendants had increased its value by removing it. To this is to be added the damage done to the real estate. The plaintiffs are also entitled to costs, including the expense of the view.

The bill is to be dismissed as to the defendant, Cone, but without costs, as it was his duty, he being the defendants' agent, to prevent the workmen from digging beyond the defendants' line.

As to the defendant Pomeroy, the bill is to be dismissed with costs.

Decree accordingly.

After the entry of a decree in accordance with the above opinion, costs were taxed by the clerk, and from his taxation the defendants appealed. The only items, the allowance of which was objected to, were the expenses of the view, amounting to \$4,841.07, which had been advanced by the plaintiffs, and interest on this amount from the time it had been advanced until the date of the final decree.

At the hearing of this appeal at September term, 1870, before GRAY, J., it appeared that the operations of the view had been carried on at the plaintiffs' request; that to reach and examine the places of the alleged trespass the plaintiffs proposed to make an excavation from a shaft on their own land, near the Benton road; that the viewers deemed that it was the wisest and best course to permit the plaintiffs to do

the work; and it was reasonable that this excavation should be made; and the expenses of the view, as stated in the item of costs, included a sum allowed to the plaintiffs for the use of their shaft and the machinery connected therewith, and also all the actual expenses of the operations, as well as allowances to the viewers for their personal services.

One of the viewers was a witness at the hearing, and on being asked "whether the viewers merely permitted these operations, or whether they authorized them to be carried on as absolutely essential to the execution of the order of the court," answered that, "so far as he could now at this period tell what the operations of his own mind were, the explorations and excavations were made at the request of the plaintiffs, and the viewers permitted them to make the explorations and excavations which they requested, and which seemed to the viewers to afford probably some light on the case, without deciding whether it was absolutely necessary that they should be made." He also testified that all the moneys expended by the viewers, and included in the item of costs objected to, were judiciously and economically expended.

The defendants contended that the authority given to the plaintiffs to examine the mine by viewers was permissive only, and the expenses incurred thereby were of the nature of preparation for trial by discovery and collection of evidence, and not allowable as costs; that the services and personal expenses of the viewers were all that could be recovered as costs; and that at any rate, the expense of investigations on the plaintiffs' own land (including the charge for use of the shaft), which they could have made without any order from the court, ought not to be allowed.

But the judge found as matter of fact that all acts included in the expenses as taxed by the clerk, were reasonably necessary to effect the purpose of the order appointing viewers, and affirmed the taxation with costs. The defendants objected that the evidence did not, as matter of law, warrant the finding and appealed to the full court.

T. PINGREE, for the defendants.

S. BARTLETT, for the plaintiffs.

CHAPMAN, C. J.

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The defendants' counsel contends that the evidence did not, as matter of law, warrant the finding of the justice who heard the cause on the appeal from the master's taxation of costs; and he refers not only to the order appointing the viewers, but to the bill itself, as sustaining his position, on the ground that the viewers were not authorized to order all the explorations that were made by their direction. But this position is not sustained by reference to the bill and order. The plaintiffs complain that the defendants dug a shaft on their own land, near the line of the plaintiffs' land, and thence excavated drifts extending underground into the plaintiffs' land, and took out the ore which they found there. They ask that these drifts may be viewed. The order directs not only that the drifts may be examined by pumping the water out of the shaft and going into it, and that the drifts may be examined which lead toward the plaintiffs' land, and also those which are under it, but that they may be cleared so far as may be necessary in order to ascertain what iron ore or other mineral has been taken from the land of the plaintiffs and under the surface thereof, and that the viewers may do all acts that may be reasonably necessary to be done to effect the purpose of the decree. If the viewers found that it would facilitate and cheapen their exploration to excavate an entrance to one of the drifts which they had discovered by digging from the surface to the plaintiffs' land, it would be proper to do so within the terms of the order and the prayer of the bill.

The master's report finds that the defendants took a very large quantity of iron ore (being 6,640 tons) from the plaintiffs' land by means of these underground passages; and though it was not done willfully, yet they were guilty of gross negligence in not taking proper precautions to avoid digging or carrying away ore from the plaintiffs' land. This result tends to show the importance of the view; and moreover it is to be presumed that the proceedings of these officers of the court were proper, unless the contrary appears. The testimony of the viewers, at the hearing, that the viewers ordered the explorations without deciding that it was absolutely necessary that they should be made, is referred to by the defendants' counsel, who contends that the expense of making the explorations should not be allowed because they were not

necessary. But it need not appear that they were absolutely necessary. It is sufficient if they were reasonably necessary; and it sufficiently appears that they were so.

It is contended that the power of the court in allowing costs depends on Gen. Sts. c. 156, § 16, and this section does not authorize the allowance of these expenses. But courts of law have power to allow the reasonable expenses of surveys and views in proper cases and the fee bill does not apply to the expense of such proceedings. Mines are so situated that special and peculiar proceedings are sometimes necessary in order to attain the reasonable ends of justice in regard to the underground passages by which access to them may be obtained by trespassers.

It is contended that the court has no power to allow interest on the moneys expended under the order of the view. The sum thus expended was large, and must be advanced beforehand, and the case has been delayed a long time; and though it is never the practice to allow interest on fees taxed according to the fee bill, yet we think the court had power to include interest on moneys advanced as a necessary part of the expense of the view in a case like the present, and that it is equitable to make such allowance.

Taxation of costs affirmed.

WISEMAN V. McNULTY ET AL.

(25 California, 230. Supreme Court, 1864.)

Execution inoperative against parties not served. A constable's deed selling the mining claims of a company who held the ground as tenants in common does not convey the title of the individuals who were not served with process and never appeared.

Recital of judgment in sheriff's deed. A constable's or sheriff's deed which fails to recite the judgment on which it issued, is void.

Error, in charge upon one of several defenses. When several defenses have been pleaded and the court has erred in its instructions upon one of them, the court above not being able to say that the verdict was based upon the other defenses alone, will reverse for the error.

Forfeiture for default on assessments—Strict construction. Where tenants in common entered into contract to develop their claims by running a tunnel, each party to be assessed once in four weeks, and for

neglect to pay assessments the shares of those in default were to be forfeited to the company: *held*, that if such forfeiture could be enforced the rule of strict literal construction should be applied. That the assessments must be levied once in four weeks and not at other times. That the "company" would not be considered to mean the remaining members.

¹ *Idem*—Contract to forfeit, invalid—Abandonment distinguished. It seems such contract is not a recognizable mode of transferring title, which would be the result if enforced; it can be distinguished from a contract providing that on failure to perform certain conditions the claim should be deemed abandoned.

² *Strict performance required of party claiming forfeit.* Parties claiming forfeit for breach of condition must show a strict performance on their part of all conditions required of them.

Necessary parties. To allow of forfeiture there must be a person in being, competent to take, at the time the forfeiture accrues.

Appeal from the District Court, Seventeenth Judicial District, Sierra County.

The following is the contract entered into between the members of the Richardson Company and those composing the Buffalo Company:

"GOODYEAR'S BAR, Nov. 16, 1856.

"Know all men by these presents, that we, the undersigned, do bargain with each other as follows, viz.: We of the first part, known as the Richardson Company, do agree with those of the second part, known as the Buffalo Company, to run a bed-rock tunnel on the ground of the first mentioned company, on Fir Cap Hill, until they reach the channel; then the Buffalo are to strike off a tunnel through the grounds of the first mentioned company until they reach their own ground; said tunnel to be no wider than six feet, and the Buffalo Company to keep all the gold taken out of the side tunnel, and the main tunnel to be forever undivided property of both companies, unless said Buffalo Company wish to run a new tunnel for their own use; in that case the Richardson Company are to pay back their portion of what the first tunnel cost."

Signed by the members of the two companies, respectively.

The following is the judgment upon which the execution issued, by virtue of which the mining claims were sold:

"*E. Gifford v. J. Donahue et als.* Action for the recovery

¹ *Booth v. Chapman*, 59 Cal. 149.

² *St. John v. Kidd*, 4 M. R. 455.

of the sum of one hundred and eighty-three dollars and thirty-seven cents, alleged to be due the plaintiff on book account. Copy of account filed October 14, 1861, and summons issued returnable on the 16th inst. at 1 o'clock, P. M. Summons returned served personally upon M. Donahue, Larry Nolan, P. Cody and H. F. Nichols, in Township No. 6. On the 16th day of October, 1861, at the hour of two o'clock of that day, the plaintiff appeared by his attorney, A. A. Cooper. The defendants came not, but made default.

"Whereupon, on motion of plaintiff's attorney, it is ordered and adjudged by the court, that E. Gifford, the plaintiff, do have and recover judgment of, from and against John Donahue, M. Donahue, Larry Nolan, B. Kenneif, D. O'Keefe, P. Cody, H. F. Nichols, Pat. Haley, James Wiseman, R. Anderson, John Doe, R. Roe and H. Hoe, composing the Richardson and Buffalo Company, on the verified complaint of the plaintiff, setting forth a copy of the book of original entries, for the sum of one hundred and eighty-three dollars and thirty-seven cents, together with costs, taxed at fourteen dollars and fifty cents, and accruing costs. On motion of plaintiff's attorney, execution issued.

"T. B. PARKE, J. P."

The following is the agreement entered into by the members of the Hibernia company after the constable's sale, and the formation of that company:

"At a meeting of the Hibernia Mining Company, held at Goodyear's Bar, the following resolution and agreement was adopted:

"*Resolved*, That for the purpose of running a tunnel upon the mining claims of said company, in the Fir Cap District, an assessment shall be levied on the members thereof once in four weeks, until the said tunnel is completed; and if any member of said company shall neglect or refuse to pay any assessment, until after three of the same shall be levied, he shall forfeit his claim or share to said company; and the company is authorized in the event aforesaid, to enter upon and take full, complete and absolute possession of said claims so forfeited, without suit or other proceeding. Dated May 26, 1862.

"John Kirk, James Wiseman, John Furlong, three claims;

Dennis O'Keefe, Lawrence Nolan, two claims; Moses Furlong, three claims; Patrick Cody, Matthew Saffin, two claims; Martin Saffin, two claims; John Dooly, half claim; H. F. Nichols, Joseph Killbride, Jas. E. Nolan, Patrick Daley."

It was under the foregoing agreement that the defendants claimed a forfeiture.

Defendants recovered judgment, and plaintiff appealed.

The other facts are stated in the opinion of the court.

CREED HAYMOND and WILLIAMS & JOHNSON, for appellant.

VAN CLIEF & BOWERS, for respondent.

By the Court, RHODES, J.

The plaintiff sues in ejectment, to recover the possession of three undivided seventeenths of a tract of mining ground, known as the mining claims of the Buffalo Mining Company, in Fir Cap Mining District, in Sierra county. It appears that the plaintiff, Dennis O'Keefe, Patrick Daley, and twenty others took up and worked these claims in 1856; then subsequently the number of claimants was reduced to seventeen, the said plaintiff, O'Keefe, and Daley, each owning the one undivided seventeenth of the Buffalo company's mining claims; that in 1858 the members of that company united with the members of the Richardson company, whose claims adjoined those of the Buffalo company, in running a tunnel in the Richardson company's claims for the benefit of both companies; that the plaintiff, O'Keefe, and Daley, worked upon the tunnel and paid assessments to some time in 1861. In October, 1861, three judgments were rendered by a justice of the peace against certain persons mentioned as "composing the Richardson and Buffalo Company," and in November following a constable sold and conveyed to L. Nolan the mining grounds "known as the Richardson and Buffalo Company claims," under an execution against the same persons named as defendants in each of the three judgments.

The purchase was made by Nolan, for the benefit of himself, the plaintiff, O'Keefe, and Daley, and a number of others, who were members of those two companies and who contributed their proportion of the purchase money; but it does not appear that Nolan conveyed to them any interest in the claims

purchased by him at the constable's sale. Shortly after the execution of the constable's deed to Nolan, he and those for whom he made the purchase formed a company, known as the Hibernia company, to prosecute the working of the claims of the two former companies. At a meeting of the Hibernia company, in May, 1862, a resolution was adopted by those representing a certain number of claims, among others the plaintiff and his grantors, to levy an assessment once in four weeks, for the purpose of running the tunnel; and the company took possession of the claims and continued to work them until the commencement of this suit. An assessment was levied on the 20th or 24th of July, 1862, which was paid by the plaintiff, O'Keefe, and Daley; and subsequently six other assessments were levied, but neither the plaintiff, O'Keefe, nor Daley paid either of them. The plaintiff said, in October, 1862, that he would not pay any more assessments, and he did not work upon and was not on the claim after some time in 1861.

In May, 1863, "a rich prospect was struck" by the Hibernia company for the first time, and on the 27th of June, 1863, O'Keefe and Daley conveyed to the plaintiff their right, title and interest in the Buffalo company's claims. Neither of the three companies seems to have been incorporated, but the persons composing them appear to have formed a voluntary association without any agreement in writing. Such are some of the facts that we have gleaned from a record almost devoid of an alphabetical index, and without the assistance of a statement of facts, which should have formed a portion of the briefs in the case.

The defendants rely upon three defenses:

First—The sale by the constable to Nolan.

Second—Abandonment by the plaintiff and his grantors; and,

Third—A forfeiture of the claims of the plaintiff and his grantors for the non-payment of assessments.

The sale under either of the three judgments rendered by Park, J. P., and the constable's deed, were void, so far as the plaintiff, O'Keefe, and Daley were concerned, because it does not appear that the summons in either action was served upon either of them, and no appearance in the actions was

made by them or in their behalf, the defendants not being joint owners, but being tenants in common of the mining claims.

The constable's deed, as to them, was void for that reason, and for the further reason that it does not recite any judgment upon which the execution issued: *Donahue v. McNulty*, 24 Cal. 411.

Second—If the jury had found for the defendants on the ground of *abandonment*, we would not be inclined to disturb the verdict, for we could not say that there was not sufficient evidence from which the jury would be authorized in finding that the plaintiff had abandoned his claim, and that O'Keefe and Daley had also abandoned their claims, but we can not undertake to say that the jury rendered their verdict for the defendants on that ground, for the question of forfeiture seemed to be pressed more than any other point, and the plaintiff complains of instructions given by the court on that point, and of the refusal of the court to give other instructions asked for by him, and the jury may have found for the defendants upon that question alone.

Third—As to the forfeiture of the claims of the plaintiff and his grantors to the Hibernia company. The agreement, in the form of a resolution signed by the plaintiff and his grantors, and a part of the defendants, provides that the assessment shall be levied upon the members of the company, "once in four weeks until the tunnel is completed." No provision is made for levying assessments at any other time or for any other purpose. In order that a forfeiture might be produced, it would be necessary to prove that the assessments had been levied once in four weeks, and not at other times, for by stipulating for a levy at those intervals of time, they have excluded the right of levying assessments at other times. The assessments must have been made for the purpose of running the tunnel, and not to meet other expenses incurred in respect to the enterprise. The evidence shows that the assessments were not levied every four weeks, and it is not proven that the assessments were made solely for the running of the tunnel. Such strict proof is required, because the law does not favor forfeitures. When, by the contract, any covenant or agreement is to be kept or performed, as a condition prece-

dent, by the party claiming the benefit of a forfeiture, he must show an exact compliance, or he will not be entitled to the forfeiture: *Von Schmidt v. Huntington*, 1 Cal. 71.

It is unnecessary to determine the question that the counsel have very earnestly pressed, whether the party claiming a forfeiture should have the same declared by a judgment of a competent court, for it will be doubtless found that each class of cases would, in that respect, depend upon its own peculiar circumstances.

But there are questions which we think lie back of the question just mentioned, and which should be first disposed of. 2 Black. Com. 267, defines forfeiture as follows: "Forfeiture is a punishment annexed by law to some illegal act or negligence in the owner of lands, tenements, or hereditaments, whereby he loses all his interest therein, and they become vested in the party injured, as a recompense which he alone or the public together with himself hath sustained." This definition, which we consider quite accurate, necessarily implies that there must be some person, natural or artificial, who is entitled to receive the benefit of the forfeiture when it accrues. The resolution adopted by the Hibernia company provides that, in case of non-payment of assessments, etc., "he shall forfeit his claim to the company," and the company is authorized to enter upon and take possession of the forfeited claim. It is not agreed that it shall be forfeited to the persons composing, or those that might thereafter compose, the company, nor to any individual by name. The company does not appear to be a corporation nor even a partnership, holding the claims as partnership property, but simply a voluntary association not formed by articles in writing and without legal existence—a body unknown to the law. As such, the company would be incapable of taking and holding mining claims, by grant, or by any other means, by which title to real estate would pass. As far as appears upon the record, the persons owning claims, who associated together in the formation of the Hibernia company, were tenants in common of those claims; at least the members of the Buffalo company and of the Richardson company, were tenants in common with each other in their respective companies, and neither party contends that they were partners, or held the claims as partnership property.

The members of the Hibernia company did not agree that those who paid the assessments should receive the forfeiture of the claims of those who failed to pay, and they could not agree with the company that it should enter upon and possess the forfeited claims, because the company was a legal nonentity.

Further: it is, to say the least, very doubtful if the term forfeiture, according to its common law signification, has any application to the rights, interests, or remedies of the several persons composing a mining association, such as we find in this case; and we think it has none.

Lands, tenements, and hereditaments, may be forfeited by various means: 1. By the commission of crimes and misdemeanors. 2. By alienation contrary to law. 3. By the non-performance of conditions. 4. By waste. (Bac. Abr. Forfeitures; Bouv. Law Dict.) Clearly, none of these modes of forfeiture are applicable to estates held as in this case, unless it be the third—the non-performance of conditions.

For the creation of a condition, for the annexing or reserving of a condition, precedent or subsequent, to or upon an estate—whether it is created directly by covenant or agreement, or arises by implication in any manner known to the law, except in the case of a will—two contracting parties are necessary, who have at the same time, or successively, an interest in the estate upon which the condition is reserved.

Bonvier says, in defining a condition: "In its most extended signification, a condition is a clause in a contract or agreement which has for its object to suspend, rescind, or to modify the principal obligation; or in the case of a will, to suspend, revoke, or modify the devise or bequest." This definition (except when applied to a will) necessarily requires the execution of a contract. It is also said of conditions annexed to an estate in lands: "Conditions can only be reserved to the feoffor, donor, or lessor, and their heirs; but not to a stranger." (Bac. Abr. Forfeiture, O.) It may be asked, then, how can a condition be annexed to an estate in land by a party owning it, and who continues to hold all the interest he ever had in it, which condition is of such a character that upon its breach the estate shall vest by forfeiture in a person who never held any interest in the land, and has not attempted

to convey it; and much more, in an association of persons who, in their collective capacity, are incapable of taking an estate in lands? "He who enters for condition broken shall be in of the same estate he was before." (Bac. Abr., Forfeiture.)

In *Waring v. Crow*, 11 Cal. 366, Mr. Justice Baldwin, in employing the term *forfeiture*, uses it as synonymous with abandonment, and holds that the mere failure to pay assessments does not produce a forfeiture of the claim of the delinquent owner; and he says that "the mere temporary absence of one partner" would not, under the mining regulations of the vicinity, create "a forfeiture of his interest," so that "a *stranger* could then come in and appropriate his share." There was no issue of a forfeiture in the case, and the learned judge employed the term in the sense in which it is used among miners, as expressing a loss of the claim by the former owner by abandonment, or by what they considered as amounting to the same thing, by ceasing to work it or refusing to pay assessments, so that any *other person* might take it up, not the vesting of the title in the grantor for condition broken. And he says that, "in order to the enforcement of the *claim*, (not *forfeiture*, as quoted in the appellant's brief,) some appropriate action by suit must be taken to liquidate the demand and sell the property," etc. A lien upon the property, or a claim against the owner, may be enforced in that manner, but a forfeiture can not; and the opinion of the court does not give the most distant intimation that it could be worked out in that mode.

It is easy to understand the rights and remedies of the parties where one has contracted with his associates who are jointly interested with him in a mining enterprise, that his share or claim shall stand as security for the payment of his proportion of the expenses that may be incurred in the prosecution of the enterprise, or that they shall have a lien on his claim in the nature of a mortgage, with the power of sale, to collect his share of such expenses, or that upon his failure to do certain things his claim shall be deemed to be abandoned; but no one of these covenants amounts to a *condition* subject to which the claim is taken or held, and the breach of any or all of those covenants will not produce a forfeiture, as recognized at common law.

The authorities cited by the counsel for the defendants upon the point of forfeiture are all clear cases of forfeiture at common law. *Woodson v. Skinner*, 22 Mo. 23, was a case of a lease for years by the city of St. Louis, the lessee covenanting to pay rent, and that if the rent should be in arrear beyond a certain time he should forfeit his term. He made default in the payment of rent, and the court held that the lease was forfeited to his grantor, the city. In *Jackson v. Topping*, 1 Wend. 394, a father granted his lands to one of his sons upon the condition that he should support his father and pay his father's debts, with a clause of re-entry in case of default. The son failed to pay one of the debts. The court held that it was a case of an estate upon condition, and that the heirs of the deceased father had a right of entry for the forfeiture, arising upon the breach of the condition.

The cases cited by the defendants from 11 Johns. 299, 14 Id. 120, 15 Id. 24, were cases where by law the penalty for the violation of the Non-Intercourse Act was a forfeiture of the goods, and the case in 5 T. R. 120, was a forfeiture for a violation of the revenue laws. Forfeitures for crimes and misdemeanors proceed upon different principles from those arising upon contract. Those cases show what are the rights of the parties in certain classes of cases, where a forfeiture has taken place as a penalty for crime, but they do not assist us in solving the question whether the defendants here had the right to claim a forfeiture.

Again, if the result contended for by the defendants can be worked out in the manner they claim, and the title of the delinquent claimholder can be thus transferred to his associates or to the company, we will then find that we have a new mode of transferring titles—a mode in which neither the owner nor any one acting under his authority, or under or in pursuance of a judgment of a court, conveys the title—a mode in which the new holder of the title comes in, neither by forfeiture for crime nor for breach of condition annexed to the grant made by him, his ancestors or grantors, nor by purchase in its most enlarged sense, nor by descent, nor by title accruing to him by operation of law. An intended purchaser would look in vain to the records of the recorder's office or in the courts, for the evidences of the transmission of a title in that mode.

The term "forfeiture" is often employed by miners as synonymous with abandonment, but the term we have considered is used in the objectionable instructions, not as denoting abandonment, but as a mode of transferring title.

What we have already said sufficiently manifests our opinion in relation to the instructions complained of, without noticing them in detail.

Judgment reversed, and the cause remanded for a new trial.

WESTCOTT ET AL. V. MINNESOTA MINING CO. ET AL.

(23 Michigan, 145. Supreme Court, 1871.)

¹ **Necessary parties in chancery—Excuse for non-joinder.** In a bill involving the rights and interests of a corporation and its stockholders it is essential that all persons in interest be made parties, or good reason shown for not making them parties. Such bill should show who are the present owners of shares and contain averments showing it filed on their behalf as well as on behalf of complainants. Mere non-residence is no excuse for non-joinder of a defendant; the averment as to unknown heirs in the complaint is also too general.

² **Premature call of meeting to assess stock.** The articles of a joint stock association provided for an assessment to be levied upon its assessable shares, upon condition *inter alia*, that the proceeds of the sales of certain 200 other shares should first have been expended. A notice was given for a meeting to be held for the purpose of making an assessment before all of these 200 shares had been sold. *Held*, that the notice was premature; that no valid meeting under such notice for such purpose could be held, although all of the 200 shares were sold between the date of the call and the date when the meeting was held; and that a forfeiture resulting from an assessment at such meeting was void.

Verbal notice of meeting. Where the articles of association provided for a written or printed notification of meetings, a verbal notice is not sufficient to bind shareholders who did not waive notice by appearing.

³ **Conditions precedent to forfeiture.** The right to forfeit shares in any joint stock undertaking must come from the law, and can only be exercised in the manner prescribed by law. In this case the articles of association are the law governing the right of forfeiture and all the conditions precedent which are made by them must be strictly complied with or the attempted forfeiture is void.

¹ *Von Schmidt v. Huntington*, 6 M. R. 284.

² *Wiseman v. McNulty*, 6 M. R. 327.

³ *Palmer v. Ford*, 70 Ill. 369.

Dismissal for defect of parties. Want of necessary parties is good ground for dismissing a bill on the hearing; and this will be done with less reluctance when the facts disclosed by the evidence fail to make out a strong case on the merits.

Appeal in Chancery from Wayne Circuit.

The opinion contains a sufficient statement of the nature of the pleadings and of the facts proven.

A. F. WILCOX, LEVI BISHOP, G. V. N. LOTHROP and S. A. GOODWIN, for complainants.

SAMUEL T. DOUGLAS, for defendants.

COOLEY, J.

This case is a sequel to that of *Titus v. The Minnesota Mining Co.*, reported in 8 Mich. 183. The pleadings are exceedingly voluminous and the facts complicated, but the following, it is believed, is a sufficient statement of the case to make the decision of the court sufficiently clear.

The bill in the Titus case was for the purpose of compelling the defendants to deliver to complainant, for himself and associates, whom he claimed to represent, one fifth of its capital stock, and to account to him for the profits of the company in the like proportion. On the final hearing, certain defects in parties were pointed out by the court, and the bill was dismissed. Afterward the present suit was commenced, and is now brought to a hearing in the name of Edward G. Westcott, Henry R. Pierson, James R. Westcott, George Kimball, Marion Brinkerhoff, Jonas H. Titus, Jr., Catharine Titus, Omar D. Conger, Gertrude M. Galloway and Daniel A. Galloway, as complainants against the Minnesota Mining Company, Samuel O. Knapp, William Hickok, Enoch C. Roberts, Frederick W. Allen, Charles E. Smith, Samuel J. W. Barry, John Gilbert, Charles Lambert, Joseph M. Smith, Samuel Congdon, Elwood Burdsall, J. R. Burdsall, Joshua Gilbert, Horatio N. Davis and Joseph Trevor, as defendants.

The material allegations on the part of the complainants are the following:

In 1845, Jonas H. Titus, Smith Titus, Myron Titus, Platt S. Titus, Omar D. Conger, Walter Buddington, John McRey-

nolds, Andrew T. McReynolds, Ira C. Backus, John H. Harmon and Asahel S. Bagg formed themselves into a copartnership in mining operations, under the name of the Baltimore Mining Company; that such company became owners of two leases of lands for copper mining, in the Lake Superior district, numbered respectively 267 and 269; that on November 22, 1846, these leases were sold by the company to William Hickok for the use of himself and associates, and assigned to the said Hickok on the terms and conditions following: That said Hickok and his associates should form a company in the city of New York for mining purposes; the stock to be represented by four thousand equal shares, of which eight hundred paid up and unassessable shares should be issued within sixty days to the associates of the Baltimore company, as the consideration for the assignment of said leases; that on or about November 30, 1846, said Hickok, with Enoch C. Roberts, Samuel O. Knapp, William Pearsall, Jr., Daniel A. Galloway, Charles Edgar Smith, Joshua Gilbert, Frederick W. Allen, Elwood Burdsall, Horatio N. Davis, Jacob Trevor, Samuel J. W. Barry and Charles Lambert as associates, did form the proposed mining company, under the name of the Vulcan Mining Company, and in their articles of association the said leases were declared to be purchased by said Vulcan Mining Company, and it was recited that such company was formed, among other things, to prosecute mining on the land specified in said two leases, or on any lands in said mineral district that might be leased, located or bought by said Vulcan company for mining purposes; that it was also further declared by said articles that the stock of said Vulcan company should be represented by four thousand shares, of which one thousand shall remain unassessable forever, and that eight hundred of these should be transferred to said Baltimore Mining Company; that either as original members, or as purchasers of shares of stock therein, the defendants Hickok, Roberts, Allen, Pearsall, C. E. Smith, J. M. Smith, Congdon, Knapp, Barry, Gilbert, Lambert, E. Burdsall and J. R. Burdsall, and the complainant, Daniel Galloway, are now the owners of all the rights in the stock and property of the Vulcan Mining Company; that the premises described in said leases 267 and 269 were afterward judged not to be valuable for

mining, and the said Vulcan company, in November, 1847, purchased of the Ontonagon company one half of the location known as No. 98, for mining purposes, taking an assignment of the lease thereof in the name of William Hickok, its then treasurer, but that afterward, and with intent to defraud the associates of the Baltimore company of their one fifth interest in the Vulcan company, said Hickok and the other associates in the last mentioned company proceeded to form a new company by the name of the Minnesota Mining Company, for mining on said one half of location 98; the formation of said new company being merely a fraudulent device to give color of regularity and fairness to the proceedings of said Hickok and his confederates, in their design to defraud the Baltimore Mining Company of their said one fifth interest in said purchase and its fruits; that said Minnesota Mining Company was in fact identical with said Vulcan Mining Company, each associate therein receiving at its organization the same number of shares held by him in the Vulcan company; that said Minnesota company afterward became incorporated, and carried on mining operations on said half of location 98, and that the said half of location 98, after having paid all the expenses incurred in its development and workings, and large dividends for many years, is now worth large sums of money.

The complainants then proceed to aver the right of the associates of the Baltimore company to the one fifth interest in said Minnesota company and to an account of the profits thereof; they associate Daniel Galloway with themselves as complainant, with his assent, because since the transactions described he has intermarried with the complainant, Gertrude M. Galloway, formerly Davis, one of the shareholders of the Baltimore company; they omit the name of William Pearsall, Jr., as defendant, on the allegation that he died in 1867, in the State of New Jersey, being then a resident of that State, but at what place they are unable to discover, and that "since he died they have diligently inquired and made efforts to ascertain where and who his heirs and legal representatives were, so as to make them parties to the suit, but have not been able to ascertain who or where they are," though they are informed they are all non-residents of Michigan, and their interests are small and well represented by the persons now

parties to the suit; they aver that the Baltimore Mining Company still subsists under its articles, and that the complainants, either as original members or as purchasers of shares in said company, are (except as hereinafter stated) the owners of all rights, titles, interests,*claims, estate and property in said company. The exception relates to two hundred shares of unassessable stock, which, by the original articles of said company, were to be disposed of, and the proceeds applied to the use of said company, before assessments were to be made on the other stock. In respect to these the averments are as follows: "All of said two hundred shares were disposed of and the proceeds expended for the use of the company before any assessment was made; that no assessment was made for more than sixty days after the date of said articles; that on July 28, 1846, ten shares of said two hundred shares were sold to the defendant, Charles Edgar Smith; that on July 29, 1846, ten other of said two hundred shares were sold to one Calvin Sweezey; that on August 1, 1846, ten other of said two hundred shares were sold to the defendant, Frederick W. Allen; that on September 28, 1851, fifty other of said two hundred shares were sold to the complainant, Jonas H. Titus, Jr., who is now the owner thereof; that the other one hundred and ten of said two hundred shares were also sold long before October 3, 1851, and the sales thereof were entered in a memorandum book of sales, and said book was lost or mislaid without such sales having been entered in the regular books of the association, and therefore your orators can not tell or set forth who the purchasers were of said one hundred and ten shares; that complainants have made diligent efforts to ascertain where and who were the purchasers and owners of the said one hundred and ten shares, and where and who were the owners of said forty shares purchased as aforesaid by said Smith, Chadwick, Sweezey and Allen, but without success. Your orators charge the said defendants, Charles E. Smith and Frederick W. Allen, are now the owners of the shares thus purchased by them, and if it shall turn out that they, or either of them, are not such owners, your orators do not know who or where the owners thereof are, but your orators charge that they, whoever they may be, are not residents of the State of Michigan, and therefore your orators pray to be permitted to prosecute the

suit as it is, and when such owners shall be discovered, if they shall be, your orators pray leave to make them parties to the suit by proper amendment and process. Your orators do not know whether said Sweezey and Chadwick are the owners of the shares thus purchased by them, nor do your orators know where said Sweezey and Chadwick, or whoever may be the owners of the shares thus purchased by them, reside; but your orators charge that they are non-residents of Michigan, and therefore your orators pray that they may be permitted to go on with the suit without making such owners parties, with leave to make them, if discovered, parties to the suit, by a proper amendment and process. Your orators do not know where or who the owners of said one hundred and ten shares are, but your orators charge that they, whoever they may be, are non-residents of the State of Michigan, and therefore your orators pray that they may be permitted to go on with the suit, with leave to make the said owners of said one hundred and ten shares, if discovered, parties to the suit, by proper amendment and process."

After these allegations regarding their rights and equities, and this attempt to excuse the failure to bring in other parties having interests in the litigation, the complainants proceed to their prayers for relief and process, which need not be particularly referred to. The case was heard in the court below on pleadings and proofs, and the bill dismissed. It must, I think, strike any one as extraordinary that it should prove impossible to ascertain who are the parties in interest and entitled to a share in the large property and profits of the Minnesota Mining Company, if the allegations of the complainants are sustained. It is indeed quite possible that any original record that was kept of the sales of this preferred stock may have become lost or mislaid as averred in the bill; but to the extent that sales are now known to the complainants, the bill ought either to show who the present owners are, or it should set forth the efforts made to discover them, and contain the proper averments showing the bill to be filed on their behalf as well as on behalf of the complainants named. The stock sold to Smith and Allen, it is fair to presume until the contrary appears, that they still own; and as they are parties to the suit, there would be no difficulty, so far as they are con-

cerned, in making the proper decree; but Sweezey and Chadwick are neither made parties, nor does it appear that any effort has been made to ascertain where they are, whether they still retain their interests or not, or if not, who have become their assignees. The mere fact that a person who is a proper party complainant is a non-resident of the State, is no sufficient reason for his not being joined in the suit: *Whitney v. Mayo*, 15 Ill. 255; and the allegation that the orators do not know where such persons are, but charge that they are non-residents of the State, is a very imperfect and unsatisfactory attempt to excuse the failure to join them in a cause in which their interest is not merely nominal, but the same with that of the complainants named. Nor is the failure to join Pearsall's heirs any more satisfactory. He is alleged to have died in New Jersey in 1867, and if complainants knew this, it would certainly be a fair presumption that they must know at what place he died, and that inquiry there ought to elicit some information regarding his heirs or representatives. It is difficult to conceive how averments in excuse of a failure to join needful parties could possibly have been made more general, vague and unsatisfactory than are these, and as the bill failed to ask any discovery as to the shares in the Baltimore Mining Company not represented by the complainants, and also failed to show that it was filed on behalf of all the shareholders, we think the demurrer to the same on those grounds was well taken and should have been sustained. The court can not make a decree binding parties in no manner before it, either in person or by representative; nor is it consistent either with the practice of the court or with justice that the defendants should be compelled to account with a part of the shareholders in the Baltimore company, leaving them subject to other similar suits on behalf of the others, unless a strong showing is made that justice to complainants is otherwise unattainable. This showing, we think, was not sufficiently made. The difficulties are still greater, however, in the case of some other persons who were at one time interested in the Baltimore Mining Company, but whose rights are claimed to have been forfeited by non-payment of assessments.

The only complainant who was a subscriber to the original

articles of the Baltimore Mining Company is Omar D. Conger. Of his interest there is no question. It was necessary for the complainants to show that the others had become purchasers of shares therein, and they seek to do this by evidence, a part of which comes from their records, and a part is the parol testimony of persons connected with the company and supposed to be familiar with its affairs. A record answering to a stock book was produced, in which the articles of association were entered and signed by the original associates, and also by other parties as they acquired interests afterward. This book, however, did not show from whom or how these subsequent parties acquired their interests, nor when or how any original subscriber ceased to be owner of shares, and it was rendered still more imperfect by the loss of one page of names, said to have been torn out by the carelessness of children. On this book the names of Edward G. Westcott, Gertrude Galloway (then Davis), James R. Westcott, Henry R. Pearson, Catharine Titus, George Kimball, and Marion Brinkerhoff first appear as owners of one share each, on September 28, 1851, at which time there must have been a considerable number of persons owners of shares in said company who are not now parties to this suit. The question is, how the complainants just named acquired their interests in said company, and in what manner those not named lost theirs.

The explanation on this subject comes almost exclusively from Mr. Jonas H. Titus, who was for a long time the president and chief manager on behalf of the associates of the Baltimore company. His testimony is, that some time in the year 1851, an assessment of one dollar a share was levied upon all the assessable stock in the Baltimore company; that this assessment was paid by a part of the associates and the stock of the others forfeited by non-payment; that the complainants, Catharine Titus, Gertrude Galloway (then Davis), George Kimball, and Marion Brinkerhoff had become assignees of assessable stock prior to that time and paid their assessments upon the same, and that the complainants, Edward G. Westcott, Henry R. Pearson, and James R. Westcott became such assignees afterward, by purchase of stock from those who had paid their assessments, but from which one of

the same, or how much they purchased, he neither informs us, nor does any one else assume to do so.

We have already said that the names of the seven complainants just named first appear on the books of the company as owners of stock, September 28, 1851. If a part of them were owners of stock before the assessment, and a part only became such afterward, the fact of their being all entered at the same time would seem to require some explanation, and that given by Mr. Titus, if we understand him correctly, is, that the names were originally upon the leaf accidentally torn out from the stock book, and that after that circumstance they were written in the book again by one of their number, in order to make the list of stockholders complete. Assuming this explanation to be satisfactory, we will proceed to consider the evidence introduced to establish the facts that an assessment was duly levied, and that a portion of the stock was forfeited for non-payment.

The articles of association of the Baltimore Mining Company authorized assessments of not exceeding two dollars per share in a year to be levied upon the assessable shares in said company, upon certain conditions. The first of these conditions was, that the proceeds of the sales of the two hundred unassessable shares should first have been expended under the direction of the trustees. The second was, that the assessments should be laid at a regular meeting of the association, by a vote of a majority in interest of the stockholders present or duly represented.

The third was, that in the notice calling such meeting, it should be stated that one of the objects of the meeting was to consider upon the expediency of laying an assessment.

The fourth was, that the assessments should be payable at such times and in such sums as the same should be called for by the trustees pursuant to the authority given them by the vote laying such assessment.

The fifth was, that notice of any assessment should be given personally or by mail, to every shareholder liable to assessment, and who should keep the secretary informed of his place of residence, and then, if his assessment was not duly paid within thirty days after the same should become due and payable, the shares upon which the same was levied should be

forfeited to the association, unless, for reasonable cause shown, the stockholder should be exempted from such forfeiture by a vote passed at a regular meeting of the association.

No very definite information is to be obtained from the evidence regarding the time when, or the place where, the meeting was held for the purpose of levying an assessment.

A notice of the date of October 3, 1851, appears to have been published in one of the Detroit papers, which stated that an assessment of one dollar per share had been levied upon the stock, and that it must be paid to J. H. Titus, of the city of Detroit, on or before the fifth day of November, then next, or the stock would be forfeited. The assessment, therefore, must have been levied on or before October 3, 1851. The notice of regular meetings was, by the articles, required to be given "by sending to the shareholders to their respective places of residence, through the post office, a written or printed notification, stating the object, time and place of holding such meeting, which notice shall be placed in the post office at least twenty days prior to the time of holding said meeting." The notice, consequently, must have been given as early as September 13, 1851, if given in compliance with the articles.

Now, in order to see whether any stock was legally forfeited, it may be well to consider in succession, each of the conditions precedent and the evidence which is supposed to show that it was complied with. And in considering these it is greatly to be regretted that the company kept no such records as would give us that full and satisfactory information which we have a right to look for in cases of this character, where rights are to be divested, under conditions which the parties have previously agreed upon, and which they understand must be complied with in order to render the proceeding effectual. The notice of assessment was signed by Mr. Conger, as secretary *pro tem*, and he undoubtedly acted as such at the meeting. Not being the regular secretary, however, it is not surprising that he kept only a rough minute of the proceedings; and we infer as well from his testimony as from that of Mr. Titus, that he assumed no supervision of the proceedings, and that his connection with them was rather formal than otherwise. The one important fact to which he testified is, that a majority

in interest of the stockholders was represented at the meeting; and this fact we regard as established by his evidence. Upon other points we must look to the testimony of Mr. Titus, who appears to have had charge of the books and papers, for such information as is now attainable.

The testimony of Mr. Titus shows that there was never any record of the proceedings of the meeting at which the assessment was levied beyond the rough minutes of the secretary *pro tem*, which have not been preserved. It also shows that there is no record of the expenditure of the proceeds of sales of the unassessable shares; but he testifies that they were all expended, and there is probably no doubt of that fact. But whether they were expended before the meeting was called for the purpose of making an assessment is not very clear. The name of Mr. Jonas H. Titus, Jr., is entered on the books as purchaser of fifty shares of unassessable stock, under date of September 28, 1851; and if this was the actual date of his purchase, this number of shares, at least, of the unassessable stock, must have been held by the company at the time notice of the meeting was given. If this was the case, we think the notice was premature, and that no valid meeting for the purposes of an assessment could have been held in pursuance of it. Stockholders, aware of the fact that they had made it a condition that no assessment should be levied until the unassessable stock was sold and the proceeds disposed of, would have been entitled to treat as void a notice given while the company was still the owner of a fourth of this stock, and when, of course, its sale before the meeting should be held, must have been a matter of uncertainty. None of the stock was assessable until these two hundred shares were sold; and no stockholder, we think, was under obligation to take any notice of a call for a meeting to consider an assessment made at a time when his stock was not liable to one. A sheriff might as well advertise a sale upon execution before the writ was issued, and expect to support it by taking out the writ before sale actually made, as for the company to support an assessment based upon a call which was made at a time when an assessment was not leviable. Assuming, however, that the first and second conditions to a valid assessment were complied with, it is very clear, we think, that notice of the meet-

ing, as required by the articles, is not shown to have been given. On this point, again, the evidence comes from Mr. Titus, and we give in full what he says concerning the notice, in order to show how far short it falls of proving knowledge on his part that due notice was given:

"Question. How was that meeting called?"

"Answer. It was called by personal notice and by written notice."

"Q. Notice to all the stockholders?"

"A. Yes, sir; according to the articles of association."

"Q. Was it the custom of the secretary of the company to keep copies of those notices given to the stockholders, when meetings were called?"

"A. There never was any meeting called for assessment, except that one, and whenever a meeting was called parties were notified; but that was a special assessment, and notice was given that the meeting would be called; a special meeting, to take into consideration the propriety of levying an assessment."

"Q. That was stated in the notice?"

"A. That was stated in the personal and written notice; not in the printed notice of the assessment after it was levied."

"Q. Have you looked for—made search for—a copy of those notices?"

"A. Yes, sir."

"Q. Been able to find them?"

"A. No, sir."

"Q. Will you state the contents of the notice; what the object of the meeting was as stated in the notice?"

"A. The stockholders were notified that the meeting would be held at a certain time and place."

"Q. For what purpose?"

"A. For the purpose of taking into consideration the propriety of levying an assessment."

"Q. As president of the company at that time, do you know whether that meeting was called according to the articles of association?"

"A. I know it was."

This was the testimony on the direct examination, and, al-

though it will be seen the witness testifies most positively to his knowledge that notice was given in compliance with the articles, yet he makes a distinction between the written notice given to some of the stockholders and what he calls "personal" notice given to others, and by which we understand him to mean a mere verbal notice, which would not have been in compliance with the articles at all. On his cross-examination he says further:

"Question. Was the notice of the meeting at which that assessment was made ever given to Samuel Knapp?"

"Answer. I don't recollect whether notice was given to him or sent by mail."

"Q. Will you swear that notice was either given to him personally or sent by mail?"

"A. I will, to the best of my recollection."

"Q. Did you give the notices?"

"A. No, sir; I did not give them all personally. Conger may have written some of them, but I mailed them."

"Q. Will you swear that notice was given to Samuel Knapp?"

"A. Whoever were known parties, subscribers to the stock, that held anything in the stock, were notified, either verbally or in writing."

"Q. Are you sure that, either verbally or by mail, Samuel Knapp was notified of that meeting?"

"A. I don't recollect whether he was here."

"Q. Did you personally or by mail, give notice of that meeting to Thomas Corcoran, of New York?"

"A. If I knew he was a stockholder, I did."

"Q. Did you give notice, either personally or by mail, of that meeting, to all the persons whose names appear upon this list of subscribers to the stock of the Baltimore Mining Company, appearing in this book as stockholders?"

"A. I can't say, only generally."

"Q. To each one of them, did you?"

"A. If I knew they were stockholders."

"Q. No matter whether you knew them or not. I ask whether you gave notice of that meeting to all the names that appear on this list of stockholders?"

"A. Yes, sir; I think so; that is my recollection; I don't know whether they ever got them or not."

"Q. Were their notices directed to their places of residence, as appears in this book?"

"A. Yes, sir; that was the only knowledge we had."

"Q. You say personal notice of the meeting at which the assessment was made, was given to some of the stockholders. Who gave it?"

"A. I gave most of them, I think."

"Q. You gave most of them?"

"A. I think so."

"Q. Did anybody else give any of these personal notices?"

"A. I don't know what they did. I don't know but Conger may have."

"Q. If the personal notices were given by both of you, and you don't know how many he gave, nor to whom, how do you know personal notice was given, except what was written notice?"

"A. I think I gave notice to all; that is my recollection."

"Q. Will you tell me how you gave personal notice?"

"A. All those that were holders."

"Q. Can you name anybody to whom you gave personal notice of that meeting?"

"A. I can't. I went on and gave notice according to the rules and regulations."

"Q. Can you name any one you gave personal notice to of that meeting?"

"A. No, sir; I can't."

"Q. Can you name anybody to whom you gave written notice of that meeting?"

"A. I sent written notices, a good many of them."

"Q. To whom?"

"A. I don't recollect. I recollect some of them."

"Q. Is there any record or entry in the books of the company that shows to whom personal notice was given, and to whom written notice of that meeting was given?"

"A. I have a memorandum."

"Q. Will you produce it?"

"A. No, sir; I have not got it here. I would not produce it if I had; but it is my recollection."

"Q. That you have a memorandum?"

"A. Yes, sir; I think I made a memorandum at the

time, and some of them responded and paid their assessments. That is my recollection."

"Q. I didn't speak of their responding, but to whom you sent notice of the meeting when the assessment was made."

"A. Well, I have told you."

"Q. Now I ask whether there is any record anywhere on the books of the company of the names of persons to whom you sent the notice, or to whom you gave the notice personally?"

"A. I know this. I told you they were all notified."

"Q. Was there any record as to whom?"

"A. Either personally or by mail."

"Q. Now, I ask you again, whether there is any other record on the books of the company, showing who was notified, and how, of that meeting?"

"A. Not that I recollect. I have not got it at any rate."

"Q. Did you give the written notice?"

"A. I did, I think; I gave all the written notices."

"Q. Then you are not able to name the persons—any of the persons—to whom you sent written notice, or to whom you gave verbal notice?"

"A. How many times do you want that question answered? There is no record of it."

Such is the testimony of Mr. Titus, to prove notice of this meeting, and it is hardly necessary to point out the particulars in which it fails to show, satisfactorily, that due notice was given. We shall assume that the witness fully believed the notice to have been sufficient, but it is not the fair inference from the testimony, when the whole is considered, that the notices were all given by him in person; and we think he is very clearly mistaken in supposing that a verbal notice was in compliance with the articles. The parties, in associating, clearly had a right to stipulate for any notice they saw fit; and we can not say that a different one would have been equally effectual, and therefore must be held sufficient. There were reasons which they might have regarded of much force for insisting upon a written notice in every instance, and when proceedings *in invitum* were taken against them, they were not bound to give heed to any other; had they appeared at the meeting in response to the notice, they

might be held to have waived strict compliance: *Schenectady, etc., Plank R.'Co. v. Thatcher*, 11 N. Y. 102; but Mr. Titus' testimony shows that those whose stock was declared forfeited were not present. Moreover, several who were then stockholders were sworn as witnesses and testified that they received no notice whatever of the meeting; so that the evidence is very strong that there was a failure at some point in giving the notices. And no one attempts to testify that the notice was given twenty days before the meeting, unless Mr. Titus' general statement that it was in compliance with the articles can be regarded as covering that ground. But that was swearing to a conclusion of law, rather than a statement of facts.

The right to forfeit shares in any joint-stock undertaking must come from the law, and can only be exercised in the manner prescribed by the law: *Matter of the Long Island R. R. Co.*, 19 Wend. 40. In this case the articles of association were the law governing the right of forfeiture, and all the conditions precedent which were made by them must have been strictly complied with, or the proceeding would be void: *Portland, etc., R. R. Co. v. Graham*, 11 Met. 1; *Lexington, etc., R. R. Co. v. Staples*, 5 Gray, 522; *Alabama, etc., R. R. Co. v. Rowley*, 9 Fla. 508. We are compelled to say that no compliance is shown in this case; nothing which warranted the company in forfeiting the stock of a single member. If, hereafter, the persons who were members at the time the alleged assessment was made should come forward with a like demand to that made by complainants, there is nothing in this record to preclude their supporting it. The result is that a number of necessary parties are not before the court, and that the circuit court decided correctly in dismissing the bill.

The necessity of dismissing the bill for defect of parties would be matter of serious regret, if it were probable that upon the merits the complainants were entitled to relief; but after listening to very full and able arguments on their behalf, and after careful examination of the facts, we do not find that the case, upon which this court expressed its opinion adverse to their claims in the suit brought by Titus, has been materially strengthened by the evidence now produced.

The decree of the circuit court in chancery, dismissing the bill, must be affirmed, with costs of this court.

CHRISTIANCY and GRAVES, JJ., concurred.

CAMPBELL, Ch. J., did not sit in this case.

KINSMAN V. JACKSON.

(42 Law Times, N. S. 80. High Court of Justice, Chancery Division, 1880.)

Covenant for working china clay—Re-entry upon breach. A mining lease contained a covenant on the part of the lessees, to "during the said term, work the said limits for china clay and china stone in the most proper and effective manner, and with a reasonable number of able-bodied men and assistants kept employed on the said works, at all reasonable and usual working times, and so that the china clay and china stone to be there found may be raised, washed, and made merchantable as speedily as practicable." And there was a proviso for re-entry and revocation of the lease upon breach of the covenants, or non payment of the dead rent and royalties. *Held*, that the lessees in omitting to "raise" the china clay, had been guilty of a breach of the covenant, even if they had in other respects conformed with the provisions of the covenant, and that in an action by the lessees, the court of chancery would not grant an interlocutory injunction to restrain the lessor, who had re-entered and taken possession of the land and works, from continuing in such possession until the trial of the action.

Motion. By an indenture of lease, dated the 3d of June, 1873, the defendants granted to the persons therein named, license to dig, work, and search for china clay and china stone, under the parcels of land therein mentioned, and all such china clay and china stone, when found or discovered, there to raise, and within the therein mentioned limits to wash, cleanse, prepare, and make merchantable and fit for sale, and to dispose of the same, and to exercise the powers and license thereby granted for twenty-one years, at the dead rent and royalties therein mentioned and thereby reserved.

The lease contained a covenant on the part of the grantees, that they "would during the said term work the said limits for china clay and china stone in the most proper and effect-

¹ Affirmed in Court of Appeals, 42 L. T., N. S. 558; S. C., 28 Weekly, 601.

ual manner, and with a reasonable number of able-bodied men and assistants kept employed on the said works at all reasonable times and usual working times, and so that the china clay and china stone to be there found may be raised, washed, and made merchantable as speedily as practicable;" and it was provided that in case the rent and royalties should remain unpaid for a space of thirty days after the times appointed in the lease for payment, then, or if the parties should fail in the performance of the covenants therein contained, it should be lawful for the grantors to revoke and make void the lease, and re-enter upon the limits, and to have, possess, and enjoy the same as if the lease had never been made.

The lease was shortly after its date assigned by the grantees named therein to other persons, who, in pursuance of its provisions, erected the necessary mining works and a steam pumping engine at a cost of upward of £6,000. These persons subsequently went into liquidation, and the present plaintiff, who had been manager of their estate, was appointed in January, 1879, their trustee in bankruptcy, and took possession of and carried on the mining works.

Shortly after that date the plaintiff caused to be dried and made merchantable the stock of china clay and china stone that been already raised, but ceased to employ any workmen in raising a fresh stock of china clay or china stone.

On the 25th July, the defendants put in a distress and were then paid the amount of this dead rent by the plaintiff, and on the 19th of August, the defendants served on the plaintiff a notice revoking the lease, and subsequently took possession of the property.

The plaintiff thereupon brought the present action, claiming an injunction to restrain the defendants from continuing in or taking possession of the property comprised in the lease, etc., and the present motion was for an interim injunction to restrain the defendants from remaining in possession until the trial of the action.

CHITTY, Q. C., and CHESTER, in support of the motion. It can not be said that we have not worked the mine in accordance with the covenant. It is not necessary that we should at all and the same times be engaged in each and every of the

operations mentioned in the lease. The working of china clay differs from many other mining operations in requiring many more processes before the material becomes merchantable, and to be engaged in some of the processes is a sufficient compliance with the covenant. Moreover we have paid the dead rent, and so long as we pay that, the re-entry does not attach. The lessors must be satisfied with the minimum rent: *Wheatley v. Westminster Brymbo Coal Company*, 22 L. T. Rep. (N. S.) 7; L. Rep. 9 Eq. 538.

JESSEL, M. R.—That case is not applicable. The defendants had worked “uninterruptedly,” and the question was whether they had worked “efficiently.” I do not, moreover, agree with MALINS, V. C., when he says that there is not any obligation on the part of the lessees to work at all, or to work beyond the amount of the minimum rent. I do not agree that a covenant to work efficiently is a covenant so long as the lessee pleases not to work, provided that he pays the dead rent. The plaintiff can not be said to be “winning” the clay in accordance with the meaning given to the term in *Lewis v. Fothergill*, L. Rep. 5 Ch. App. 103. We can not be compelled to continuously work this mine at a loss for the sake of paying the plaintiff’s royalties: *Carr v. Benson*, 18 L. T. Rep. (N. S.) 696; L. Rep. 3 Ch. App. 524; Woodfall, L. & T., 11th Edit. 624.

If the court is, however, against us on this point, no substantial breach of covenant has occurred, for the defendants can not rest their right to re-enter upon any breach of covenant which took place before the 25th of July, but they must rely upon the non-raising of the china clay between the last mentioned date and the following 19th August, when they sent the notice revoking the lease; and when the peculiarity of a china clay mine is taken into account, the non-raising for so short a period is immaterial, provided that we have been engaged in the other processes.

DAVEY, Q. C., and PHEAR, for the defendants, were not called on.

JESSEL, M. R.

This is a motion which requests me to prevent the landlord,

or lessors, as they are called, from remaining in possession of these china clay works, of which they have taken possession. The object of the motion is to restrain them from remaining in possession until the trial. The motion is made on behalf of the trustee in liquidation of the lessee, who undoubtedly was in possession at the commencement of the liquidation. Now, in order that the lessee should succeed in this motion, I must be satisfied, upon the present materials before me, that he has at least a *prima facie* case so strong that, were I to remain of the same view after the trial, I should decide in his favor; or I must be satisfied that the question in dispute depends upon the decision, with regard to facts, as to which the judge could not decide upon the affidavits, and might therefore assume the possibility of the plaintiff eventually succeeding, and think it desirable to keep things in *statu quo* until the trial of the action. Now this case involves both points. I say nothing on the second point, because it is admitted by counsel on both sides that there is a conflict of evidence, although they did not quite agree as to the character of the conflict; one saying there was a weak conflict, and the other saying there was a strong conflict of evidence. But, upon the other point, I should be no better able to give an opinion upon the construction of the covenant on a cause day than on a motion day, and therefore there is no reason for allowing my decision to be suspended as to that part of the case, and as to that part of the case there is no dispute as to facts. Now it is necessary to consider what the demise is. It is the demise of a license "to dig, work and search for china clay and china stone within, under, and throughout" the parcel of land which is therein referred to as limits, "and all such china clay and china stone, when found or discovered there, to raise within the said limits, to wash, cleanse, prepare, and make merchantable and fit for sale." Therefore there are two things to be done; they are, first of all, "to raise, and within the said limits to wash, cleanse, prepare, and make merchantable and fit for sale;" and, the same, subject to the payments, reservations and covenants therein contained, "to carry away, convert and dispose of to their own use, and at their will and pleasure." Then the term of demise is to be twenty-one years from the 24th June, 1873, at a dead rent,

and at a royalty "for each ton of china clay and china stone over and above 343 tons, which should be raised and made merchantable and removed from the limits by the grantees." Then there is this covenant: "and shall and will during the said term work the said limits for china clay and china stone in the most proper and effectual manner, with a reasonable number of able-bodied men and assistants kept employed on the said works at all reasonable usual working times, and so that the china clay and china stone to be there found may be raised, washed and made merchantable as speedily as practicable."

Now, the question that has really to be decided is this, whether if the lessee having raised a quantity of china clay from the works, then takes his men off from the raising and employs them in making it merchantable for a long period, is that a breach of the covenant? I have no hesitation in saying that I think it is. He is to work the land for the china stone or china, but during the period in question his men are not employed in working the land at all. They are employed, no doubt, in making the china clay merchantable, washing it, etc., but they are not working the said limits. They are not performing that part of the covenant; they are doing nothing to the land; they are doing something to the china clay which has been taken out of the land, which I admit they are also bound to do. It appears to me, therefore, that this covenant binds the lessee to raise china clay at all reasonable and usual working times, and it can not be pretended that to take the men off for a very long period is not a breach of that covenant. Now, there has been no china clay raised for many months, but on the 25th July there was a distress levied, and the rent was paid, which, no doubt, acknowledged the licensee's right to possession up to that date. Then there is no working going on, and on the 19th August there is a notice given to put an end to the lease. It has been argued before me that I must not take into account the neglect to work up to the 25th July. That is a mistake. It is quite true if he had begun to work on the 26th July it might have been argued that they had waived for that purpose the previous non-working; but as they continued not to work, you must look at the non-working previously to ascertain whether it

was a cesser of the working, or whether it was merely what may happen at all times by reason of accident, delay or something else, and not the cesser of working, that is, not the cesser of raising; and when you see they had not attempted to do anything from the previous January or February, you see there was a purposely and intended cesser of the working, and therefore you look at the previous time, as to what had been done with the view of throwing light upon what had not been done between the 25th July and the 19th August, and in that way only do I take into consideration the previous non-working. I am not prepared to say that the absolute cesser between the 25th July and the 19th August, would not do. I think it would. I think it could not be called working at all usual and reasonable working times. I do not see that in the three weeks there was no usual or reasonable working times which could have been occupied; but I do look at the prior time for the purpose I have stated. That being so, however reluctant I may be to enforce what are called forfeiture clauses, I can not say that there has not been a breach of this covenant, and I am bound to decide it irrespective of any question of hardship. It is not for this court to alter men's contracts entered into deliberately. If lessees will choose to accept leases with these clauses in them, they must know perfectly well that it is almost impossible to avoid a breach of some or other of these numerous provisions, and they must rely upon the mercy or the sense of moral justice, if I may call it so, on the part of the lessor. Mostly, as a rule, when they accept these leases they do not rely upon the law, they merely rely upon the forbearance of the lessors. That being so, when the law is invoked, it is impossible, whatever hardship there may be, for me to do otherwise than apply the law as it exists; that is, fairly to construe the covenant with the view of ascertaining its real meaning; and, according to that construction, I must decide that the proviso for re-entry or the clause of forfeiture, or whatever it may be, did come into operation. Motion refused. Costs to be costs in the action.

Solicitors: T. and H. R. GILL, BELL and STEWARD.

VANATTA V. BREWER ET AL.

(32 New Jersey Equity, 268. Court of Chancery, 1880.)

The doing dominates the intent. In construing a deed the question is, not what did the grantor intend to do, but what has he done by apt and proper words?

The proper words to be used in creating a limitation upon the term granted by a lease, are "while," "as long as," "until" and "during."

Right of re-entry must be reserved. To create a good condition upon which the term granted by a lease shall end before lapse by expiration of time, a right to re-enter, on breach, must be reserved.

Breach does not operate forfeiture. A breach of the covenants of a lease, in the absence of a stipulation to that effect, does not work a forfeiture of the term.

Where a term is demised in clear and apt words, it can be defeated only by words as strong and express as those by which it is created.

Covenant distinguished from condition and limitation—Facts of the case—Injunction. Upon motion to dissolve an injunction restraining the defendants from sinking a shaft, it appeared that the defendants were assignees of a lease of the premises which contained a clause that the lessees should commence a search for minerals within two months from the date of the lease and should have twelve months from such date to explore the land for ores or minerals. *Held*, that the clause was neither a limitation upon the term granted, nor a condition upon breach of which the term should end, but was a simple covenant, which in the absence of a stipulation that a breach should work a forfeiture, would not have that effect; and that the injunction must be dissolved.

On motion to dissolve injunction heard on bill and answers.

HENRY S. HARRIS, for motion.

J. G. SHIPMAN, *contra*.

THE VICE-CHANCELLOR, (VAN FLEET).

This is a motion to dissolve an injunction. Its decision presents simply a question of construction. The complainant, on the 6th of August, 1875, executed a lease, under seal, to one Thomas McCann, whereby he gave, granted, demised and leased unto McCann, and to his heirs and assigns, the full, free and exclusive right, privilege and liberty of entering into and

upon certain lands, and of exploring the same, and of sinking pits and pit shafts therein, and of making levels, and mining and taking, removing, or otherwise disposing of any and all ores or minerals then being in, under and throughout the lands, for the term of twenty years from the date thereof. The rent reserved was the payment of a certain sum of money for each ton of merchantable ore removed from the premises. Immediately following the premises, the lease contains this clause:

"And the said party of the second part, for himself and his assigns, doth covenant, promise and agree to and with the said party of the first part, his heirs, executors, administrators or assigns, that he will commence exploring for iron ores on the premises, within two months from the date hereof, it being hereby understood and agreed by and between the parties hereto, that the said party of the second part, his heirs and assigns, shall have twelve months from the date hereof to explore the said land and premises for iron ores or minerals."

It is admitted a search for ore was commenced within the time specified. An excavation was made, and a small quantity of ore raised and removed—the complainant says less than one hundred pounds. No further work, either in exploration or mining, was done until January, 1880. The defendants obtained title to the lease, by assignment, in December, 1879, and afterward, in the following month, commenced sinking a shaft near the complainant's dwelling house, at a point where he says no previous exploration or excavation had been made. Their work was arrested by the injunction which they now seek to have removed.

That the lease gave the lessee a right to enter upon the lands demised, and to search for ores therein, and to mine and remove the same, there can be no doubt. The terms used to grant those rights are both apt and comprehensive. But for the presence of the clause just quoted, the instrument would have contained nothing which would afford the slightest pretext for challenging the rights of the defendants. What is the office of this clause? Is it a limitation of the term granted, or a condition upon a breach of which the term ends, or simply a covenant? I think it is very clear it is not a limitation. In

the construction of a deed the question is, not what did the grantor intend to do, but what has he done by apt and proper words: *Adams v. Ross*, 1 Vroom, 510. The proper words to be used in creating a limitation are, while, as long as, until, and during. The examples given by Blackstone are: "As when land is granted to a man so long as he is parson of Dale, or while he continues unmarried, or until out of the rents and profits he shall have made £500, and the like": 2 Blackstone Com. 155.

It is equally clear, I think, it is not a condition, for the authorities are agreed that to create a good condition a right to re-enter, on breach, must be reserved to the lessor. Thus Littleton says: The words *si contingat* will create a condition if a power of entry is added; and therefore if A grant land to B, to have and to hold, to him and his heirs, and if, (or, but if,) it happen that B do not pay to A £10 at Easter, without more words, this is not a good condition; but if these words be added, that then it shall be lawful for A to re-enter, it will be a good condition: 4 Cruise Dig. 428; Shep., Touch. 122; 1 Washburn on Real Prop. 320; *Willson v. Phillips*, 2 Bing. 16; *Wheeler v. Dascomb*, 3 Cush. 285. And where it is doubtful whether a clause in a deed be a covenant or condition, the court will incline against the latter construction: 4 Kent Com. 132.

The words here are plain and simple words of covenant, and nothing more. In respect to their legal significance there can be no dispute. No right of re-entry is reserved, and there are no words of forfeiture or cesser. The rule is settled, that a breach of the covenants of a lease, in the absence of a stipulation that a breach shall have that effect, does not work a forfeiture or determine the term: *Bockover v. Post*, 1 Dutch. 290.

Where a term is demised in clear and apt words, it can only be defeated by words as strong and express as those by which it is created: *Willson v. Phillips*, *ubi supra*.

A clause in a lease stipulating that the lessee shall deliver up the demised premises on three months' notice being given, and the payment to him of a sum of money, has been held to be neither a limitation nor a condition, but a covenant, and therefore that the giving of the notice and tender of payment,

pursuant to the covenant, did not end the term: *Wheeler v. Dascomb*, *supra*.

The authorities render it manifest that the term granted by the lease under consideration is still outstanding and undetermined, and, consequently, as the defendants now have the title to it, that this court has no authority to deprive them of its enjoyment. The injunction must be dissolved with costs.

1. Stipulation in lease for forfeiture in case of sale on execution: *Patterson v. Silliman*, 28 Pa. St. 304; *Post* PARTNER; *Carey v. Bright*, 58 Pa. St. 72.

2. Forfeiture implied from neglect to comply with district rules: *King v. Edwards*, 4 M. R. 480.

3. Resumption of work, before relocation, prevents forfeiture: *Gonu v. Russell*, 3 Mont. 358; *Post* RELOCATION; *Belk v. Meagher*, 1 M. R. 510, 522; *Little Gunnell Co. v. Kimber*, 1 M. R. 536.

4. Forfeiture carries with it the trade fixtures of tenant: *Davis v. Moss*, 38 Pa. St. 346; *contra*, *Sumner v. Bromilow*, 34 L. J. Q. B. 130.

5. Lessee estopped by acts, to deny forfeiture: *Wilmington Co. v. Allen*, 95 Ill. 238; *Post* LEASE.

6. Contractor agreeing to forfeit payment for non-completion of a ditch by a given time, relieved on the ground of mistake of facts as to length of ditch, etc.: *Verzan v. McGregor*, 2 M. R. 565.

7. Forfeiture not allowed after breach of his own covenants by the party claiming the right to forfeit: *Columbia Co. v. Miller*, 78 Pa. St. 246; *Post* LEASE.

8. Forfeitures never favored: *Mt. Diablo Co. v. Callison*, 5 Saw. 440; *Post* LODGE; *Brown v. State*, 5 Colo. 496.

9. Strict construction against forfeiture: *Colman v. Clements*, 5 M. R. 247.

10. Forfeiture of shares upon winding up of company: *In re East Kongsberg Co.*, *Bigg's Case*, L. R. 1. Eq. 309.

11. Forfeiture from assignment of lease not favored: *Bowser v. Colby*, 1 Hare Ch. 109.

12. Where shares forfeited, owners not liable as contributories: *In re Cobre Copper Co.*, *Kelk's Case*, *Count Pahlen's Case*, L. R. 9 Eq. 107; *In re North Hallenbeagle Mining Co.*, *Knight's Case*, L. R. 2 Ch. App. 321.

13. Distinction between rights of under-lessees, where lessor re-enters on a forfeiture, and where he accepts a surrender: *Great Western Railway Co. v. Smith*, L. R. 2 Ch. Div. 235.

14. Exercise of power of forfeiture of shares, by joint stock company, without notice to holder: *Stewart v. The Anglo-Californian Gold Mining Co.*, 21 L. J. Q. B. 393.

15. Whether the interest of a licensee in a mining license has been forfeited, is a question of fact: *Beatty v. Gregory*, 17 Iowa, 109; *Post* LICENSE. The same of a lessee: *Karns v. Tanner*, 5 M. R. 289.

16. Agreement to refrain from declaring forfeiture of lease on condition of search by lessee for petroleum: *Escoubas v. Louisiana Petroleum Co.*, 22 Lou. Ann. 280; *Post* **PROSP. CONTRACT.**

17. Lease not forfeited by failure to pay royalty: *Gale v. The Oil Run Petroleum Co.*, 6 W. Va. 200; *Post* **LEASE.**

18. Party seeking to enforce forfeiture must have fully performed his own part of the contract: *Slavonian Co. v. Vacovich*, 7 Saw. 217.

See ABANDONMENT.

BOWMAN V. BATES ET AL.

(2 Bibb, 47; 4 Am. Dec. 677. Court of Appeals of Kentucky, 1810.)

¹*Suppressio veri, as to salines.* A party having discovered salt water on the land, by artifice prevented knowledge of the fact reaching the vendor until he had been able to consummate the purchase: *Held*, that the purchase must be set aside.

The case appears from the opinion.

By Court, LOGAN, J.

Bowman was the proprietor of 500 acres of land in the Illinois grant, which had been found to contain salt water; and while ignorant of this discovery, he alleges that the appellees, well knowing the circumstances, as well as relying on his want of information, imposed a fraud upon him in the purchase of 250 acres containing said water.

To evince the fraudulent intention in the purchase, he sets forth his residence in the county of Shenandoah, in Virginia; that the appellee, James, being then in Virginia, his brother and co-defendant, just informed of the salt water discovered and the prospect of its immense value, wrote immediately to him, and sent a special messenger with the letter to purchase said land.

That the appellant's agent, residing at Louisville, in Jefferson county, being informed of the dispatched messenger, and the object of his mission, and when preparing to forward the recent acquired information, was applied to by the said John who endeavored to dissuade him from sending the information to the appellant; and in order to effect his purpose proposed making him interested in the purchase.

That the said James received the letter from his brother, and according to his request applied to the appellant with money transmitted by the messenger, and affecting an almost total ignorance of the land and its value, as a traveler moving part of his family to the western country where land could be purchased upon low terms, and saying he had been recommended to the appellant as the proprietor of sure military land

¹*Norris v. Taylor*, 1 M. R. 383; *Crump v. U. S. Co.*, 3 M. R. 454; *Brown v. Bledsue*, 1 Ida. 746; *Fishback v. Miller*, 15 Nev. 428; *Bowman v. Irons*, 2 Bibb. 78; *Post SPECIFIC PERFORMANCE.*

in the grant; who answered his interrogatories so evasively, but so artfully, as clearly to impress on his mind that he neither resided near the land, nor had any particular information respecting it; although in fact he resided within a few miles of it, and possessed the knowledge aforesaid of the discovery of salt water.

These allegations are in substance supported by the proof in the cause. Indeed, the defendants in their answers do not deny the most material of them, but claim the benefit of better inferences than the fraud imputed by the appellant.

In answer to the fraud charged, their defense may be reduced to three points: 1. The opinion as expressed by the appellee, John, before he started the messenger with money to his brother to purchase the land, that the salt water on it "was not worth anything." 2. That his expressions to the appellant's agent were merely in "jest;" and 3. That the sum given for the land was a full and a high price for it.

With respect to the first ground relied on in the defense, it is proper to observe that while the appellee gave it as his opinion that the salt lick on the land was worth nothing, contrary to the opinion of his friend, Mr. Lock, who "advised him to purchase it," he in "a few days after" informed Lock of his intention to send with a view to assist his brother to remove his mother to this country, and to "direct him to purchase the lick, but feared he would do but badly." And by his answer, it appears that "before he wrote to his brother on this subject he had applied to" the supposed agent of the appellant "to know whether he was authorized to sell the land, who informed him he was not." To this may be added, that about this time it appears he did send, and with money to purchase, if the land could be bought; and if not, to obtain a lease of it.

Under these circumstances, combined therewith the application to the appellant's agent, and the nature of the interview, this court can not infer anything favorable to the appellee from the ground first taken. But on the contrary, it is constrained by a conviction not to be resisted in the ordinary estimation of circumstances to declare such evidence of insincerity as but further proof of a conceived fraud; and as evincing an expectation to discourage others from the intended purchase. Nor does it follow that this idea of the salt

lick being of little value was necessary to be impressed only on those who had in view to purchase it, but likewise on others, who might otherwise disseminate contrary information.

The second ground relied on in the answer which seems to have for its object to divert the force of the fact charged, by turning into ridicule and idle pastime the expressions of the said John when he applied to the appellant's agent, this court can not countenance. The manner in which the interview was had and conducted, as proven in the cause, repels the idea of innocent jokes on the occasion. The court can not rationally account for expressions and conduct in that interview upon the ground of fun. It can perceive but one obvious meaning in calling at the house of Bowman's agent late in the evening, and, after some conversation on the subject, then to request him to walk into another room; his shutting the door and reasoning with him, as the agent swears he did, and which his father corroborates, not to send to Bowman's, stating that his messenger was five days gone, and he had given him directions not to spare his horse.

The fact then, as proven by the appellee, that he had not so instructed the bearer of his letter, and that he was really but indifferently mounted, can but be viewed as another circumstance of his fraudulent intention. To induce the agent to believe the trip unnecessary, he reminds him of his start of five days, and the great speed he was directed to make of his horse for the journey, etc., and because he proves it untrue, hence he concludes he will be thought to have been "jesting." The more obvious conclusion is, in the opinion of the court, that the slower the horse and the longer the delay, the greater the fear of the agent's messenger first arriving.

It may be proper to give an extract of John Gwathmey's deposition, Bowman's agent, as completely exposing the duplicity of the appellee, John, in his pretenses as to the little value of the salt water on the land. That said John Bates stated, as "his opinion, it was the strongest water that is yet known, and pulling out a phial of it, said it was of twice the strength of Mann's lick water, and observed it was worth ten thousand pounds. Mr. Bates then asked me if I would not like to have a share in it, and said that his brother intended to buy it for himself, him and Capt. Lock, and that himself

and Capt. Lock had been talking on the subject, and concluded that I was well fixed at this place, and could dispose of salt on good terms, and had concluded that I would be a proper person to take into partnership."

Gwathmey also swears that he thought Bates serious in this conversation. But to believe otherwise would be contrary to the plainest evidences of human motive. This evidence is conclusive in showing the design of the man in his declaration that the salt water on the land "was not worth anything." And it very satisfactorily shows that if it be true that the value of the land was given, Bates did not think so. This leads us to consider that part of the defense which relies on having given a full price.

And it is true several witnesses prove in the cause that they thought two dollars per acre, the price agreed to be given, high for the land, and, moreover, that the salt lick and water was of little or no value. The difficulty of ascertaining the precise value of salt water recently found is not doubted, and it must often, if not generally, be matter of speculation only. In this, however, it is to be recollected that the contract was made on the third day of September, in Shenandoah, Virginia, and this suit to set it aside was commenced on the tenth day of November following, in Jefferson county, at the distance of at least five hundred miles from the place of contracting.

If then there were grounds to believe the salt water on the land would be valuable when this contract was made, the expectation of which seems to have influenced the conduct of the appellees, this court can not perceive sufficient time thereafter for a fair experiment to have been made, as to the quantity and quality of the water, to blast the flattering prospects of its value. It was the interest of the appellees to conceal its worth, if thereby they could expect to defend the fraud. It was their policy to impress the idea of a bad bargain even before suit; for a conscious fraud by the *suppressio veri* might well have anticipated an application for redress.

If it is intended, by proving the little value of the land and water, to repel the evidence of fraud as it relates to the appellees in the contract, it can not avail them, because they thought differently of its value, as is proven in the most unquestionable manner.

If the land thus sold for \$500 had been worth £10,000, as, by the evidence of Gwathmey, John Bates supposed it was, it is believed the fraud would have been universally admitted. Whether it was worth that sum, was, to be sure, matter of calculation, which might or might not prove correct. But it is not upon a conjectural and speculative worth, growing out of an uncertain and unknown matter, hidden within the bowels of the earth from the view of both parties, that the complainant founds his application to chancery; it is upon the concealment of fact, consisting of visible matter, already ascertained, and of a nature and quality to enhance the value of land known to the purchasers, and by them believed unknown to the seller, that this application finds its way to the relieving arm of equitable power.

Had the matter of fact which had been discovered, a fact of a material and substantive kind, been correctly related as within the knowledge of the purchaser, a mistake of opinion in a false estimate of its worth could be no ground for relief between parties able to contract. But although the court ought not to interfere in contracts founded on false reasoning and mistaken calculations, from facts essentially detailed, yet, it is believed, it ought to exact a fair representation of premises material in forming an opinion, in order that the party might possess the means of exercising his own powers of calculation. Such, it is conceived, is the spirit of the rule which forbids a *suggestio falsi* or *suppressio veri*.

When the contract was made it appears that Bowman expressed some apprehension the purchaser was an imposter, and proposed to him to take back his money. To which Bates replied, "he really was not taking him in; that he knew nothing about the land, except what he had heard in Winchester; that the complainant had land for sale, and thinking his title indisputable, induced him to purchase." A comment on such conduct is unnecessary. The fact is, it abundantly appears that almost every part of his conduct was wrapped up in the means of imposition and fraud.

But the price of the fraud is made the strong hand of defense. Its ingredients are the same as if ten thousand pounds certain were the worth of its purchase. Salt water was dug for, and it was found. It was tried, and salt made of it. Its

fluctuations, ebbs and flows seem to have been well known to the defendant, John. His calculations are made on those premises, and he deems it immensely valuable. He conceals, together with his co-actor, this distinct, visible, tried and substantive quality from its uninformed owner, and obtains both it and the land for his price on the land itself, and now declares he ought to hold all, because he made a bad bargain.

How does the evidence in the cause disprove the representations of John Bates, as to the probable value of the salt water on the land, and not only by his representations to Gwathmey, when it was his interest to give the other side of the picture in regard to its worth, but also by his conduct clearly evincive of his real opinion? It does not appear that better evidences were obtained, to satisfy those witnesses who prove it of little or no value than Bates himself and others possessed, which induced a contrary opinion. It does not even appear that the water has disappeared, or grown weaker in its state of attention when so highly prized. Fresh water may have been permitted to intermix with it, or the collection of mud and dirt to hide its quantity.

The labor expended does not seem to prove anything conclusive in regard to the proper subject of inquiry. On what part of the land it was bestowed, how far it had progressed, etc., is uncertain, except the statement as to cost. It is conceived unnecessary to decide whether a case might not possibly happen, though fraudulent, but without injury, which ought not to be set aside by a court of chancery. It is, however, laid down as a "constant rule in equity that where there is either *suppressio veri* or *suggestio falsi* the release or other deed shall be avoided:" 1 Fonb. 113. And in the same book, page 60, note r, it is also declared in general terms that "wherever fraud or surprise can be imputed to or collected from the circumstances of the transaction, equity will interpose and relieve against it."

In this case that there was *suppressio veri* the court is well satisfied, and it is also of opinion that the truth suppressed was material information for the complainant in regard to the subject-matter of contract. The court would further suggest that to obtain one's property for its supposed value against his will, or to deceive him into a consent, would be a

fraud, which it would be very unwilling to countenance by dismissing the complainant's bill, and might become pernicious in practice, by bringing the dishonesty and cunning of some to operate upon the honest credulity of others. And to permit fraud to elude the vigilance of chancery by cunning, and still greater fraud in hiding for a time the real value of its purchase, seems too repugnant to the administration of justice, the protection of right, and the suppression of wrong.

Upon the best view we are capable of taking of the case, it is the opinion of a majority of the court that the contract ought to be set aside, the writing canceled, and the defendants refunded their two hundred and fifty dollars.

CLARK, J., dissented.

Decree reversed, etc.

¹DALE ET UX., Executors of Fulton v. ROOSEVELT.

(5 Johnson, Ch. 174. Court of Chancery of New York, 1821.)

Coal vein in river bed—Judicial cognizance of the practicability of mining. Defendant, by representations in strong, if not overdrawn language, induced Fulton to purchase a coal mine for a sum stated, and an annuity of \$1,000 for 20 years—unless, after the mine had been faithfully worked, it should not produce a certain amount—and under the contract a certain tract was conveyed. The coal bank in fact cropped out between high and low water mark on the Ohio river, on the borders of the tract conveyed. From that fact the court concluded that any attempted working of the mine was necessarily useless and unprofitable, and the contract to be founded on mistake or misrepresentation, and the defendant was enjoined from any attempt to collect the annuity.²

The plaintiffs, as executors of *Robert Fulton*, filed their bill the 18th of November, 1817, for relief against an agreement entered into between the testator, in his lifetime, and the defendant. The agreement, which was under seal, was

¹ Re-affirmed on rehearing: 6 Johns., Ch. 255; affirmed in Court of Errors, *post* 377.

² The injunction in this suit, forbidding action on the annuity against Fulton's executors, *held*, not to forbid a suit against his *heirs*, to collect the annuity: *Dale v. Roosevelt*, 1 Paige, Ch. 35.

dated September 16, 1813. It recited that the defendant had discovered a coal mine on the bank of the river Ohio, in the Indiana Territory, some distance above Anderson's creek, at which mine the steamboat on her first descent took in coal for her fuel; that the coal mine was embraced by certain land, particularly described, which land the defendant covenanted to convey, by letters patent from the United States to F. in fee; and F. covenanted, on receiving the letters patent for the land, to pay to the defendant four thousand four hundred dollars, and so forth; and, also, to pay to the defendant for the term of twenty years from the fifth of June, 1814, one thousand dollars yearly, in quarterly payments; that F. should, in a convenient time after the fifth of June, 1814, commence working on the mine; and should the mine become exhausted after faithfully and scientifically working the same, within the boundaries of the land so described, and not so much coal be found as to produce *twelve thousand* chaldrons, and should a question arise within the *twenty* years, whether the land had been or could be made to produce that quantity, the matter should be decided by three persons, to be chosen in the mode provided in the agreement, and their decision should be final; and the payment of the one thousand dollars a year to the defendant should cease, if the decision should be that the quantity of twelve thousand chaldrons had not been or could not be produced; otherwise the annuity was to continue. The bill stated that F. was induced to enter into this agreement solely from the representations of the defendant, which were false and deceptive, and that the defendant had brought a suit at law, against the plaintiffs, as executors of F. on the agreement. The bill prayed for an injunction to stay the suit at law, and that the agreement might be decreed to be delivered up to be canceled, and for general relief.

The defendant appeared and filed his answer, the 23d of January, 1819, and replication having been filed, several witnesses were examined by the parties. The evidence taken in the cause is fully stated in the opinion delivered by the court.

WELLS, for the plaintiffs.

D. B. OGDEN, for the defendant.

THE CHANCELLOR (JAMES KENT):

The representatives of Robert Fulton, deceased, are sued at law, upon a covenant which he made with the defendant, to pay him an annuity of one thousand dollars a year, for twenty years, to be computed from the fifth of June, 1814. The consideration for this covenant was the conveyance of 1,040 acres of land on the right bank of the river Ohio in the now State of Indiana, stated to embrace "a certain coal mine on the bank of the Ohio river, in the Indiana Territory, some distance above where the creek called Anderson's creek empties into the Ohio river," and which coal mine the defendant "did discover." These words are taken from the contract set forth in the bill, and under the hand and seal of both parties; and the great point in the case is, whether the contract was not founded upon representations made by the defendant to Fulton, which were not true in point of fact.

There can be no doubt that the sole inducement on the part of Fulton in making the purchase was to obtain the ownership of a mine of mineral coal. This is apparent from the contract itself and from every document connected with it, and referred to in the pleadings.

The representations made by the defendant were in writing and in answer to a letter of Fulton, and were made a few days before the execution of the contract; and those representations gave a very flattering account of the situation of the coal mine, of its productiveness and of the facility with which it might be worked.

In that answer the defendant stated "the quality of the coal to be *excellent*; that the *first stratum* had not been worked to the bottom; that when he first discovered the mine, after removing a few inches of earth, he did with the aid of a hatchet and a few wooden wedges break or split off squares of coal as large as two men could handle, and then threw in his boat a few chaldrons procured in that way, and kept with it a constant fire all the way to Natchez. That when he arrived at Natchez he sold what remained, say thirty or forty bushels, for smith's use. That on his second descent with the steamboat, he had, on arrival at the coal bank, no occasion to take any coal out of the mine, as he found ready

raised, within ten feet of where the steamboat came to, many thousands of bushels thrown up, ready to be carried off by flats, some of which were then on the spot to load. That he took on board as much of the coal as he judged necessary; that during his residence at New Orleans he found several flats loaded with coal for sale, which came from the same mine; that the mine had been opened on or near the center of the line of the river; that the coal when the water is up is overflowed, as well as all the bottom land on the margin of the Ohio; that by wheeling it a *few yards* out of the mine, it may be put upon high ground accessible at all stages of the water."

These representations are contradicted by two witnesses, who have been examined on the part of the plaintiffs, and who prove that the mine is not on the bank of the river, and is not productive, and is almost incapable of being worked.

James M'Daniel, Jun., says, he knows the tract of land said to belong to the heirs of Fulton, and that he lives in Perry county, in the State of Indiana, and about five miles from the tract, and is a farmer of fifty years of age and upward. That he is acquainted with the Ohio river to the distance of forty miles above the mouth of Anderson's river, and that there is a coal mine four or five miles above the mouth of that river. That a bed of coal was discovered opposite the said tract of land, "in the bed of the river," and that coal has been raised from that bed, though he knows of no boats taking in coal there except a small canoe, and he assisted in raising eight or ten bushels from that mine. That in some seasons it is covered throughout the year with water, and is always covered, except in very low water. That the water of the Ohio rises from thirty-five to forty feet, and the current is rapid, and the coal mine could not be worked, "but at a very great expense."

John Bristow says, he is upward of thirty-three years of age, and is by occupation a carpenter, and resides at Troy, in Perry county, aforesaid, and is acquainted with the tract of land said to have been sold by the defendant to Fulton. That he is acquainted with the Ohio for thirty miles up from the mouth of Anderson's river, and that there is a coal bed "in the bed of the Ohio," four or five miles above the mouth of Anderson's creek. That it does not appear to be an extensive

mine, and the place is covered with water at least two thirds of the year. That the water of the Ohio rises thirty feet and more, and the current is rapid, and the mine could not be worked, "but at very great expense." That the bed of coal is covered with slate rock to the depth of six or seven feet. That he does not know of any steamboat or other boat taking in coal at that place except one keel boat, which was there loaded for sale. That he has assisted in raising coal from that mine.

The defendant examined three witnesses in support of the truth and accuracy of his representations.

Thomas C. White says, he has been in the State of Indiana, upon the river Ohio, and rode on horseback from Troy, in that State, at the request of the defendant, to view the tract of land mentioned in the contract, though he had not seen the map or survey of the land made by order of the government of the United States. He says he passed over these tracts twice on horseback, and in crossing the land he discovered a bed of mineral coal on which several men were at work, digging up the coal, and it appeared to him to extend along the surface of the bank of the Ohio for about thirty or forty yards; and it was evident to him, "that the bed of coal was in its natural situation, and constituted a part of the land." That from the circumstance of there being "much coal in the neighboring land," and from the appearance and extent of the bed of coal, he should suppose that it would yield a great quantity. That the bed of coal aforesaid was "on the bank of the river," and covered with water in the wet seasons, by the rise of the river. That when he saw it, the water was low, and the spot which he viewed could not be worked when the river was full, and it would be necessary to sink a shaft on the bank above. That the Ohio is a public highway, and he does not know how high it rises.

Elias Rector is a postmaster at St. Louis, in the State of Missouri. He descended part of the Ohio river with the defendant in 1809. He had, before that time, discovered that there was a quantity of mineral coal on the west side of the Ohio, in the State of Indiana, "some distance above" the mouth of Anderson's creek, and he went down the river for the purpose of showing the mineral coal to the defendant.

He believes that there is a coal mine there, "as he has seen the coal in different places." He and the defendant, and others, took out of the mine some of the coal for the purpose of trying it. He has seen coal on that land, and "on other tracts in the neighborhood." The land he refers to "was just above the mouth of Anderson's creek." The coal was not found in the bed of the Ohio, and it was not a deposit, and he believes it to have been a mine of mineral coal, and the said coal mine, he believes, is not generally covered with water, but he does not know the greatest height of the river, or the expense of working such a mine.

This is all the material testimony in the case; for I have not considered the testimony of Latrobe as having any bearing on the point, touching the truth and accuracy of the representations of the defendant, which were the inducement to the contract; and the examination of Jacob Harvey, being after publication and the inspection of the testimony previously taken, was irregular.

The most precise, accurate, and authentic testimony on the subject is given by the two witnesses who reside in Indiana, near the land in question, and they disprove completely the allegations contained in the defendant's letter to Fulton. The coal mine, which may be deemed appurtenant to the land conveyed to Fulton, is in the bed of the river Ohio, and could not have been conveyed to Fulton, for that river is a navigable water, a great national highway, and does not belong to any individual. The representation was, that it was on the bank of the river, and the proof is, that it is in the bed of the river; this is a most material mistake or representation, and goes to the essence of the contract. Nor could such a bed of coal be worked but at enormous and ruinous expense, if the right of working belonged to either of the parties. It is, for the most part of the year, under water, and the river rises from thirty to forty feet, with a rapid current, which would probably defeat every effort to sink and maintain shafts on the spot. If the mine described by the two witnesses in Indiana be the mine intended, then the representation of the defendant was most essentially untrue. All his glowing descriptions of the fertility of the mine, and the facility of working it, are without proof. He states that he procured some chaldrons of coal

with the greatest ease, sufficient for constant use in the voyage down to Natchez, and to leave a surplus of thirty or forty bushels; that at another time, he saw many thousands of bushels thrown up, and flats loading there, several of which had descended loaded to New Orleans. It is impossible to reconcile this representation with that of the two witnesses who live in the neighborhood, and who have both worked at the mine in the bed of the river, and who state that it never yielded beyond a very scanty supply, and is so covered with the waters of the river, that it never could be worked but at a very great expense.

Do the two witnesses, examined on the part of the defendant, restore truth or credit to his representations? If there has been color for these assertions, it would seem that they must have been very susceptible of proof; for the matters to which they related were, from the nature of them, of great and general notoriety; yet we have but two witnesses, one a stranger in that country, or only a transient visitor, and the other does not appear to have been there since his visit with the defendant in 1809; and neither of them locate the land contained in the contract with any satisfactory precision. T. C. White rode over the tract on horseback, without having seen the map or survey of the land; and we are to presume the place is in a wild state, without any definite boundaries. He discovered a bed of mineral coal along the surface of the bank of the Ohio, and which would be covered with water in wet seasons, and he should judge it would yield a great quantity, from the appearance and extent of the bed, extending thirty or forty yards, and from the circumstance of there being "much coal in the neighboring land." This is a very lame and superficial account, and certainly leaves us in great doubt as to the identity of places. There is no resemblance to the spot described by the other two witnesses, and the neighboring land he speaks of is understood to mean land not conveyed by the defendant. If there be much coal in the neighboring land, it shows the necessity of a very precise location of places, and how easily mistakes may have been made by the two non-resident witnesses of the defendant.

Elias Rector speaks still more loosely. The land he refers to was "just above" the mouth of Anderson's creek; and he

says, that before he went down the Ohio with the defendant, he had discovered coal "some distance above" Anderson's creek; and he believed there is a coal mine there, "as he has seen the coal in different places." It is worthy of notice that he speaks very dryly of his discovery, in company with the defendant, and only observes, that he and the defendant took some of the coal to try it; but he says nothing of slabs or squares of coal, and of loading the boat with chaldrons, and sufficient to have a superabundant quantity of thirty or forty bushels at Natchez.

Upon the whole I consider the representations made to Fulton as altogether fallacious, and that the consideration for the stipulation of such an extravagant annuity did not exist in point of fact. Whether the defendant made the statements in his letter to Fulton through mistake, or under the delusions of his own imagination, or by design, I am not able to say. It is sufficient for the decision of this case that the representations are not supported, but are contracted by the proof, and that the claim of the annuity upon such a state of the case is unconscientious and unjust.

The bill seeks to have the contract delivered up to be canceled; but it has been partly executed, as the land described in the contract has been conveyed, and part of the consideration paid. The want of a coal mine corresponding with the representations of the defendant, seems to have been intended by the parties to apply to the annuity as there was a provision in the contract itself, that if the mine should not be competent to yield the stipulated quantity of coal after faithfully and scientifically working the same, "and within the boundaries of the land described," the annuity should cease. It has not been so worked by Fulton, or his representatives, and it might therefore be alleged that the experiment intended has not been made. The answer to that objection is, that there was no coal mine within the boundaries of the land conveyed, but it was adjoining to it, in the bed of the Ohio; and this, if true in point of fact, (as I believe it to be,) is a decisive answer to the objection.

Another answer to it would be sufficient if the mine was covered by the deed, and that is, that it would have been an idle, hopeless and ruinous object to have attempted to work

such a mine "scientifically" according to the plan and manner of working coal mines in Europe, in the middle of a mighty river covering the spot most part of the year, and rising forty feet with a resistless current. It would be absurd to suppose that Fulton was obliged to expend the whole amount of the accumulated annuity in the attempt, before he could be entitled to be discharged from the annuity. This would be making the end entirely subservient to the means. It is sufficient that in the judgment of reasonable men who had examined the spot, *and had actually worked upon it*, the attempt would have been useless, or attended with very great expense and hazard. I shall accordingly decree that the defendant be perpetually enjoined from suing or prosecuting any suit pending at law, for the recovery of the annuity, or any part thereof, and that he also pay to the plaintiffs the costs of this suit.

Decree accordingly.

NICHOLAS I. ROOSEVELT, Appellant, v. DALE ET UX.,
Executors of Robert Fulton, Respondents.

(2 Cowan, 129. Court of Errors, New York, 1823.)

¹**Sale of coal vein in river bed—Relief from exploitation.** Fulton purchased of Roosevelt a tract of land on the bank of the Oh'o river, the vendor representing and believing that it contained a valuable coal mine, and besides an obligation to pay \$4,400, the vendee covenanted to pay an annuity of \$1,000 for twenty years, unless after the mine was faithfully worked by the purchaser it should not yield a certain quantity of coal. It appeared that there was no mine of any such value, accessibility or productiveness as alleged by the vendor. *Held* that, as there was *no such mine as represented*, the purchaser was not bound to work it to determine whether it should yield the prescribed quantity, and that the vendor should be perpetually enjoined from prosecuting at law for the annuity.

²**Relief based on representation false but not fraudulent.** Relief may be granted in equity against any deed or contract founded on represen-

¹Affirming *Fulton v. Roosevelt*, ante, 369.

²The contract to pay the \$4,400 was unsuccessfully resisted in an action at law, the court holding that fraud was not a defense at law, under the plea of *non est factum*: *Dale v. Roosevelt*, 9 Cow. 308. This case was followed by the court in *Stryker v. Vanderbilt*, 25 N. J. L. 482, but denied in a dissenting opinion, p. 497.

³Compare *Smith v. Chadwick*, L. R. 20 Ch. Div. 27; *Crysler v. Canaday*, 90 N. Y. 272; 43 Am. Rep. 166; *Woodland Bank v. Hiatt*, 58 Cal. 234.

tations found not to be true, although the representations were based on misapprehension of facts and were not fraudulently made—on the ground of mistake.

Mistake, in equity, may be shown affirmatively as by bill, or as a defense; and may be proved by parol testimony.

Appeal from the Court of Chancery. All the material parts of the pleadings and proofs are stated in the opinions of the judges; and see, also, 5 John. Ch. Rep. 174, S. C., where the pleadings and the proofs considered material by the chancellor in the court below, are stated, together with the decree appealed from, and the reasons of that decree.

ROOSEVELT, for the appellant, said the whole case resolved itself into a question of fact upon which the chancellor should have awarded an issue. Here was neither fraud nor mistake. The evidence afforded no pretense for the former, and if it gave countenance to the latter, or even established a mistake beyond all doubt, this could not avail the respondent. The contract was executed, and could not be set aside without affirmative evidence of fraud. And he went into a full examination of the evidence in reference to the two questions of fraud and mistake; and to show, also, that the chancellor erred in supposing there was not, in fact, a valuable coal mine in existence, as supposed by the parties; that though the mine might lie principally in the river, yet, being above tide water, it was no less the subject of private ownership, and might have been worked to advantage at certain seasons of the year, as the testator of the respondents had agreed, in order to determine its extent and value.

To show that the proprietor of the bank above tide water owns, *usque filum aquæ*, he cited Harg. Law Tracts, 5; *Palmer v. Mulligan*, 3 Caines' Rep. 319; *Adams v. Pease*, 2 Conn. 484; *People v. Platt*, 17 John. 210; *Hooker v. Cummings*, 20 Id. 99.

At any rate, the chancellor should have awarded an issue to try the questions of fraud and mistake.

M. VAN BUREN, for the respondent, said that Fulton's inducement to purchase was the supposition that the land contained a valuable coal mine. This was presented by Roosevelt in the most imposing point of view. He examined the evi-

dance and contended that Fulton had been misled by Roosevelt's representations; and whether this was actual moral fraud, arising from a knowledge that the history which he gave was untrue, or a mistake, it was the same thing in its effect upon the contract: 1 Madd. Ch. 208, and the cases there cited.

If a man will represent a state of things as within his knowledge, and thereby draws another into a contract, the latter ought not to be holden if the representation be untrue.

Coal did not exist in the bank to any extent worth naming. If there was a mine it was in the bed of the river. But it is said the Ohio is private property. This we deny. It is a public highway; and there are several acts of Congress establishing ports of entry upon it in different places.

It was doubtless competent for the chancellor to have awarded an issue, had he thought it necessary, but this is a matter of discretion, like referring a question of law to the judges. In only two cases is he peremptorily required to award an issue. These are upon a question of *devisavit vel non* and adultery; the former at common law, the latter by statute. Even in these cases he may disregard the verdict, or send it to another jury, if he is dissatisfied with the decision of the first. But the appellant did not ask the chancellor for an issue.

Again, if the cause go to an issue it must be determined, as before the chancellor, by written depositions of foreign witnesses, taken by commissioners. The object of an issue is to have the benefit of an oral examination of witnesses.

S. JONES, in reply.—This agreement is as deliberate an act as the parties can do in the law, and from which they ought not to be released unless some substantial cause is shown, in the clearest manner. One part of the agreement is to pay the annuity provided a coal mine is found yielding a given value. There is a special provision as to the mode of testing this fact. This we ask the respondent to follow up, and we will submit peaceably if the result is against us.

The contract has been in part executed by a conveyance of the land. We have done all which was necessary, on our part, to execute the contract. We are not seeking to enforce

any demand, but were proceeding at law to enforce the contract against Fulton's representatives, when we were arrested by an injunction. Is an executed contract to be set aside because there may be scruples about its equity? Had we come to enforce an executory contract, an appearance of unconscientiousness might have driven us to law; but there is a wide difference between coming to compel the execution of a contract, and to rescind one which is already executed. It is an axiom that you can not set aside the latter unless fraud is clearly shown. This rule is so well known and established that I should be ashamed to cite authorities in its support. It comports with the plainest rules of common sense, and need only be stated to be acknowledged. There is no pretense for alleging fraud in this case, and even if a mistaken representation be sufficient for the respondents, none is established. (Here he examined the evidence as to these points, and contended that Roosevelt's representations were shown to be substantially correct.)

The rule in relation to awarding an issue, as established by the latter cases in England, is, that whenever the chancellor finds there is a material question of fact about which the witnesses differ, he will always award an issue.

WOODWORTH, J.

The appellant commenced an action in the Supreme Court against the respondents to recover the consideration stipulated to be paid for a title to certain lands in the State of Indiana. The contract contains two distinct covenants: the one for the payment of \$1,400 for the title; the other for the payment of an annuity of \$1,000 for a coal mine supposed to be on the premises.

The bill prays that the appellant may be compelled to surrender the agreement to be canceled; that it may be declared null and void, as having been obtained by deceit and fraud, and for an injunction to restrain the respondents from proceeding in a suit at law, and for general relief.

It does not appear from the case whether an injunction was granted in the action for the purchase money; but in the appellant's points it is stated that an injunction was issued by one of the masters in chancery, and not dissolved by the

chancellor. In the decree no notice is taken of the suit at law. It directs that the appellant be perpetually enjoined from suing or prosecuting any action or suit at law, for the recovery of the annuity or any part thereof.

There is nothing in the decree relating to the \$4,400; and for aught that appears there is no impediment in the way of recovery to that extent. This I presume is the cause why the chancellor does not vacate the contract, but applies the powers of the court to operate upon the annuity only. In this view it was proper to leave the title to the land in the representatives of Fulton.

The question then is, whether the contract respecting the annuity was entered into on the part of Fulton in consequence of representations which were either fraudulent, or untrue in point of fact, and founded on mistake.

As it is very evident the inducement of Fulton to contract was a belief in the existence of a valuable coal mine, if it shall appear that he relied on a state of facts disclosed by the appellant, which are found to be untrue, I apprehend it is not material whether the intent was fraudulent, or the representation proceeded from misapprehension or mistake. On the argument I understood the counsel to say that the contract being executed it could not be set aside unless for fraud. It will be conceded that every kind of a mistake is not relievable in equity; as where the fact from its nature was doubtful, or at the time of the agreement equally unknown to both parties; but they are relievable where there is express evidence of the intention of the parties. Thus, in *Gee v. Spencer*, 1 Vern. 32, a release was set aside by reason of the misapprehension of the party: 18 Vin. 370; *Mildmay v. Hungerford*, 2 Vern. 243; 1 Fon. 106.

In *Gillespie v. Moon*, 2 Johns. Ch. 596, the chancellor observes: "I have looked into most, if not all of the cases on this branch of equity jurisdiction, and it appears to me to be established, and on great and essential grounds of justice, that relief can be had against any deed or contract in writing founded in mistake or fraud. The mistake may be shown by parol proof and relief granted to the injured party, whether he sets up the mistake affirmatively by bill, or as a defense." Also, in *Bingham v. Bingham*, 1 Ves. Sr. 127, an agreement

was made for the sale of an estate. The plaintiff was relieved on the ground of mistake. It was held, that although no fraud appeared, and the defendant apprehended he had a right, yet there was a plain mistake, such as the court was warranted to relieve against, and not suffer the defendant to run away with the money, in consideration of the sale of an estate to which he had no right. It may be laid down as a general proposition that to rectify mistakes is the peculiar province of the court of chancery: 1 Ves. Jun. 445. Indeed, a contrary doctrine would strike at the root of fair dealing, if the party making a false representation might allege it was not done fraudulently. To Fulton it was immaterial whether the appellant acted fraudulently or not—the injury to him is in either case the same. It is enough that he put confidence in the statement, and relying on its truth, consented to be bound.

The contract recites that the appellant did discover a coal mine on the bank of the Ohio river, which is embraced within a tract of land particularly described, containing 1,040 acres. It prescribes the manner in which Fulton was to be relieved from the payment of the annuity, should the mine become exhausted after faithfully and scientifically working, the same, according to the plan and manner of working coal mines in Europe. In the argument it was contended that relief must be sought under this provision. The answer of the objection is that the clause has reference to a different state of facts. It takes for granted that the contract can not be invalidated by reason of a fraud, or any other equitable ground existing at the time of its inception. It does not relate to a deficiency of coal at the commencement of the operations, but is intended to guard and protect the party against a future failure. That contingency has not happened. The respondent says: "We are not bound to incur great and unnecessary expense in working the mine, without the prospect of remuneration. We are absolved from this inasmuch as there is no coal mine on the bank of the river, answering the description given by the appellant." If this be true, it must be evident that the clause relied on has nothing to do with the question now before the court. The respondents seek relief on distinct grounds of equity. They allege that they have been deceived, and drawn in to make the contract by

false representations. If they have succeeded in this respect the contract must necessarily fall so far as regards the annuity. The cause then resolves itself into a question of fact—is there a coal mine on the bank of the river within the boundaries of the land as described? and if so, was it fairly and truly represented in the appellant's letter of the 23d Nov., 1813?

The description is certainly given in glowing colors. I think a purchaser would not be considered very sanguine in believing the acquisition to be a mine of wealth. The appellant says: "When I first discovered the mine, after removing a few inches of earth, I did, with the aid of a hatchet and a few wooden wedges, break or split off squares of coal as large as two men could handle." He threw into his boat a few chaldrons. At Natchez he sold thirty or forty bushels that remained. In his second descent he had no occasion to take coal out of the mine, as he found already raised, many thousands of bushels, ready to be carried off by flats, some of which were then on the spot. At New Orleans he found several flats, loaded with coal for sale, which he ascertained to have come from the same mine; that the coal, when the water was up, is overflowed, as all the bottom lands are on the margin of the Ohio; but by wheeling it a few yards out of the mine, it may be put on high grounds accessible at all stages of the water. If this description is not substantially supported, it would be iniquitous to compel the respondents to pay the consideration. I think this presents a case in which, if there was no mistake or fraud, there would be no difficulty in obtaining proof. A coal mine so accessible, so productive, in the midst of inhabitants, can not be an obscure object. Its existence is susceptible of the most satisfactory proof. Numbers must have been employed in raising the immense quantities of coal stated to have been found on the surface, as well as many persons to transport it as an article of commerce. Something more than scanty proof of a coal mine, bearing a resemblance to the original, is justly expected. The fact alone that conclusive proof is not exhibited is, in the absence of explanation, a circumstance unfavorable to the appellant's claim, and attaches suspicion to the original representation. The respondent's witnesses are acquainted with the Ohio river, thirty or forty miles above Anderson's creek. They speak of but one coal mine.

James McDonald, Jun., says he is acquainted with the tract of land mentioned; he lives five miles from it; that there is a bank of coal in the bed of the river; in some seasons it is covered throughout the year with water, and is always covered, except in very low water; the water rises from thirty-five to forty feet; the coal mine could not be worked but at very great expense.

John Bristow lives near the land. His testimony, in substance, concurs with that of McDonald.

It is scarcely credible, if there had been a valuable coal mine on the bank, it should be unknown to these witnesses, both of whom have assisted in raising coal from the bed of the river.

Elias Rector, a witness for the appellant, says he went down the river in 1809. He believes there is a coal mine there; that he and the appellant, with other men, did take out of the mine some of the coal; that the coal was not found in the bed of the river, nor was it a deposit; nothing is said about the quantity of coal taken, or with what ease it was obtained. The smallest quantity would satisfy the words of the deposition. Why not support the description of the appellant, if it could be done consistently with truth? It is very clear to my mind that the representation given by Rector would not have been deemed satisfactory to Fulton, or any other purchaser. It has but little resemblance to the letter of the appellant.

Thomas C. White, another witness for the appellant, says he has been in the State of Indiana and knows the land; he has passed over it twice in traveling, for the purpose of viewing the tracts, at the request of the appellant; he discovered a bed of coal on which men were at work; it appeared to extend on the surface of the bank for about thirty or forty yards; it was evident it constituted a part of the land; he can not say how much coal may be produced from the land but from the circumstance of there being much coal in the neighborhood and from the appearance and extent of the bed he supposed it would yield a great quantity.

From the statement of this witness I think it may be inferred that he was not a resident. He merely says he has been in Indiana and was sent by the appellant to view the

tract. The question again forcibly returns, why not examine some of the persons who had worked the mine and who knew something about the large quantity of coal that had been sent down the river? It can scarcely be presumed they had all disappeared. White indeed says he was told that a steamboat had been seen at the bank taking coal on board, which had been dug and placed on the bank; but this is hearsay and no evidence.

I do not consider Latrobe's testimony material as to the representations upon which the contract was made. He says that Fulton intimated that possibly the situation of the mine might be such as to render it impracticable to work it, excepting when the waters of the Ohio were low; the witness suggested that shafts might be sunk at some distance from the river, to obviate the difficulty. Admitting that Fulton was apprised of the great rise of the river, the material inquiry is, was the mine on the bank, and if so, does the proof warrant the description given by the appellant? I think it does not. In my opinion the testimony of the respondents greatly preponderates, and fully supports the chancellor's decree.

Some suggestions were made as to awarding an issue to try the fact I have been considering. Whenever there are doubts regarding facts, an issue is proper; but the chancellor has a right to take upon himself the decision of every fact put in issue upon the record. The propriety of an order for an issue is a question depending on the nature and force of the testimony. Where, from the nature of the question, or from the testimony already given, it appears that further light may be obtained, it would be proper to require further proof; but if the evidence be satisfactory or decisive in favor of either party, the rights of such party ought not again to be hazarded before another tribunal: 1 Mad. 365; 1 John. Cas. 500.

I am of opinion that the decree of the chancellor be affirmed.

SUTHERLAND, J., concurred.

BOWKER, BOWNE, BRONSON, CLARK, DUDLEY, EARLL, GREEN, HATHAWAY, HUNTER, KING, LEFFERTS, MALLORY, M'INTYRE, OGDEN, REDFIELD, STRANHAM and THORN, senators, concurred.

SAVAGE, Ch. Justice (after stating the testimony of the witnesses).—I can not view this transaction in the same light with the late chancellor. If there ever was fraudulent intent in the mind of the appellant, at what time did it originate? In 1809 he first discovered what he supposed to be an extensive bed of coal. He, with Rector, purchased the land. In 1811 he became the owner of the whole, and expressed an intention of working the mine. At this time Fulton knew nothing of it. Two years elapsed before he had any knowledge of its existence, and when the fact was communicated to him there was no offer to sell; nor does it appear that such an offer was ever made, until he applied to make the purchase. When this application was made the appellant freely communicated in writing the facts which induced him to place great value upon the mine, and he referred Fulton to Baker, an engineer, then in the employment of Fulton himself, for the truth of his representations. Baker was applied to by Fulton, and confirmed their truth.

Further, the facts stated as to the discovery of the mine, the procuring coal with great facility, and the purchase of the land, are fully confirmed by Rector. The fact of the appellants taking a large quantity of coal on his second passage down the Ohio, is admitted; but it is alleged that it had been fraudulently placed there. This allegation is totally unsupported. White proves the existence of the coal mine of considerable magnitude; and it is not positively disproved. The witnesses, McDonald and Bristow, knew of no coal mine in that vicinity except one in the bed of the river, but they do not state that they have ever been on the land to look for it.

By the contract, Fulton was to have commenced working the mine in June, 1814, or as soon as convenient thereafter; and if the coal failed, then the salary or annuity was to cease. It does not appear that Fulton ever took any measures to fulfill this part of the contract, or that any measures for this purpose were adopted by his representative after his death.

This contract was deliberately entered into and ought not to be set aside either for fraud or mistake, unless upon full and positive proof. In my judgment the proof on the part of the respondents does not at all support the allegation of fraud, and the proof on the part of the appellant substan-

tially supports every representation made by him. I am of opinion, therefore, that the decree of his honor, the chancellor, perpetually enjoining the appellant from prosecuting at law for the recovery of the annuity, and compelling him to pay costs, should be reversed.

The existence of the coal mine being the only point in controversy which admits of doubt, this being strenuously asserted on one side and as strenuously denied on the other, as the proofs are conflicting in relation to it, and as the decision of facts properly belongs to a jury, and both parties aver that they have further testimony on that subject not now before the court, I am further of opinion that the chancellor should be directed to award an issue to determine that fact.

BURT, CRAMER, LYNDE, WHEELER and WOOSTER, senators, concurred.

A majority of the court being of opinion that the decree should be affirmed, it was thereupon ordered, adjudged and decreed, that the decree of the court of chancery, made in this cause, be affirmed with costs to be taxed, and that the record, etc.

BAILEY V. WATKINS.

(6 Bligh's New Reports, 275, Note. House of Lords, 1826.)

¹ **Collusion between trustee and purchaser.** Confirmation of sale set aside upon showing of arrangement by purchaser to take in one of the trustees making sale, as a partner.

This was an appeal to the House of Lords against an order of the Court of Chancery, rescinding a former order of the same court, by which the report of the master, finding the appellant the best bidder and purchaser of an estate sold under the decree of the court, had been confirmed. The question arose in a creditor's suit, in which the bill was filed by the respondent for payment of the debts of a testator, who had devised and bequeathed to trustees his real and personal estates to be sold for the payment of his debts.

¹ *Collins v. Case*, 1 M. R. 91; *Massey v. Davis*, 1 M. R. 247.

A sale was directed under the decree and orders of the court, and upon the sale, the appellant being the highest bidder for certain iron works, etc., was reported the purchaser, and the report was confirmed absolutely. Six months after the order of confirmation, a discovery was made by two of the trustees for sale named by the testator, that the appellant had, before the sale, entered into an agreement with Lewellyn, their co-trustee, who was the acting manager of the iron works, to admit him into partnership of the iron works in case the appellant should become the purchaser; and, accordingly, after he was declared purchaser, he proposed to give Lewellyn one eighth of the profits of the concern as managing partner, but being afterward doubtful of his capacity to manage it, or desirous of taking another partner, who paid a *bonus* or profit to the appellant of £7,000, he gave £1,500 to Lewellyn to relinquish his claim.

Upon a motion made on behalf of the two trustees, who were defendants in the suit, and affidavits filed in proof of the facts above stated, the order confirming the purchase was rescinded.

'BLAIN V. AGAR.

(1 Simons, 37. High Court of Chancery, 1826.)

¹Relief in equity against directors. The shareholders in a joint stock company are entitled to relief in equity where the conduct of the directors has been fraudulent or amounts to a violation of the terms on which the company was formed.

Necessary parties. If several of the shareholders assign by deed their deposits to others and appoint the latter their attorneys, for recovering their deposits, the assignees can not sue on behalf of themselves and their assignors, but the latter, however numerous, must be made parties.

The bill was filed by five persons on behalf of themselves and the other parties to an indenture of the 30th of January, 1826, who were, either originally or by assignment, holders of 1,690 shares in a company called "The Royal Stannary or British Mining Association." The defendants were the directors of the company. The bill stated that in 1825, the de-

¹ S. C. after amendment, 6 M. R. 393.

² *Mexican Co., In re*, 2 M. R. 36.

defendants or the majority of them, had caused to be printed and published a prospectus, which, after mentioning the capital of the company to be £500,000 in shares of fifty pounds each, the names of the directors, trustees, bankers and other officers, stated that the directors had then the opportunity of selecting in Wales, Devon and Cornwall several mines which were then being worked, and others in a state fit to make returns as soon as steam-engines, etc., could be erected, and that they therefore calculated on obtaining almost immediate benefits for the adventurers in the undertaking; that in consequence of this prospectus more than 20,000 shares were applied for before May, 1825; that these applications were acceded to, to the extent of 6,200 shares only, the defendants intending to keep the remainder for themselves, in case they could make a profit by sale of them and if not, to reject them; that deposits of five pounds per share were paid upon the 6,200 shares to the bankers and upon the account of the directors, and that receipts were given for the same accordingly; that some of the original shareholders afterward transferred their shares to other persons, by which means the plaintiffs and the other parties on whose behalf they sued became in November, 1825, and were, at the time the bill was filed, the holders of 1,690 shares; that since the plaintiffs had purchased their shares they had discovered that some of the persons who were named as directors in the prospectus had never acted as such, but had always been strangers to the affairs of the company, and that such of the defendants as were named as directors in the prospectus had, of their own sole, assumed authority, admitted the other defendants into the directorship; that the plaintiffs were ignorant of the names of all the shareholders except those on whose behalf they sued; that the defendants had taken mines and expended money in working them when part only of the shares had been disposed of, and deposits of five pounds only had been paid even upon those shares; that no deed for establishing or regulating the affairs of the company had been prepared; that the defendants refused to take upon themselves the 3,800 shares they had reserved, or to pay the deposits thereon; and that they had paid £2,500 to a person whom they denominated as the projector of the scheme, but whom the plaintiffs had never heard of before.

The bill charged that under these circumstances the moneys which had been paid by the plaintiffs and the other persons on whose behalf they sued, had been obtained by fraud and misrepresentation, and for a purpose which had failed, and could never be carried into effect. It then set forth an indenture of the 30th of January, 1826, made between the persons whose names were mentioned in the schedule thereto of the first part, and the plaintiffs of the other part, whereby the former assigned to the latter the deposits paid on their shares and appointed the latter their attorneys to do any lawful acts to dissolve the association, and to recover the moneys thereby assigned from the directors, bankers or trustees of the company; and it was declared that the plaintiffs should stand possessed of the moneys so to be recovered in trust for the parties thereto of the first part. The bill then alleged that the parties to that indenture of the first part were very numerous and amounted to so many as to render it exceedingly inconvenient to place them as parties on the record; and that the doing so would lead to so many difficulties as would render it impossible in effect to obtain a decree. It prayed that the defendants might be decreed to pay to the plaintiffs the sums which had been paid on the shares as before mentioned with interest.

The defendants put in a general demurrer to the bill.

Mr. HART and Mr. THEOBALD in support of the demurrer.— This association is, to all intents and purposes, a partnership: *Beaumont v. Meredith*, 3 V. & B. 180. On what principle, then, can these plaintiffs be entitled to relief in a court of equity? They allege that they have advanced certain sums of money to form the capital of a partnership which has been abandoned, and that therefore they are entitled to have their money returned. This is nothing but the subject of an action for money had and received: *Nockels v. Crosby*, 3 Barn. & Cress. 814.

Next: This being a partnership, all the partners ought to have been made parties to the suit. Besides, most of the shareholders are assignees of shares, and as the shares are mere choses in action, the assignors ought to have been made parties to the suit, for they might have no right to assign

their shares. And if the assignors can divest themselves of all responsibility by assigning their shares, the assignees may do so too, by the same means.

The bill charges the directors with fraud. Now, although the original shareholders might be entitled to prefer this charge against them, their assignees can have no such right: for there is no privity between them and the directors; and therefore the assignees may have no right to recover the deposits from the directors, although the original shareholders might: *Mitt. 129*; especially as it does not appear that the shares were transferred with the consent of the directors.

The ATTORNEY GENERAL and Mr. KNIGHT in support of the bill.—The principle upon which these plaintiffs come to a court of equity for relief is the same as that which prevailed in *Colt v. Woollaston*, 2 P. W. 154.

Upon the facts stated in this bill, there can be no doubt that the object of these directors was imposition from the beginning; and that the scheme was a bubble. The directors kept back 3,800 of the shares in order that they might sell them for their own profit, although the whole of the shares might have been disposed of. They, moreover, have spent all the money that was subscribed, and have given a great part of it to a projector, though no such person was mentioned in the prospectus, and the plaintiffs never heard that there was such a person until they learned that the money had been paid to him.

This is not a case of a partnership. On the contrary, the plaintiffs expressly disclaim the relation of partners. They seek no accounts, nor is their object either to establish or dissolve a partnership. They merely say that the defendants have got possession of their moneys fraudulently, and that they are entitled to get them back again without making any of the other sufferers parties to the proceeding. There is no contract, nor any thing in common, between these plaintiffs and the other persons who have been deceived. Each sues in his own right, and for his own money. Besides, these plaintiffs sue in two characters, viz., as shareholders themselves, and as trustees for the parties to the deed of the first part; at all events they are entitled to recover their own deposits.

The bill contains an express allegation that the plaintiffs

are ignorant of the names of all the shareholders except those who are parties to the deed.

Mr. HART, in reply.—In order to bring this case within the principle on which *Colt v. Woollaston* was decided, it ought to have been alleged that the directors, when they allowed the prospectus to be published, knew that the scheme could not be carried into effect, or was not intended to be. The bill states quite a different case, namely, that they did not allow it to be carried into effect, but contemplating that it would be a profitable concern, retained a large number of the shares for themselves.

When a record discloses a great variety of interests which are not brought before the court, it is not sufficient for the plaintiff to say that he has not made the persons having those interests parties to the suit, because he does not know their names. He ought to call upon the defendants to disclose their names to enable him to make them parties to the record.

The vice-chancellor, after stating the material contents of the bill, added:

To this bill all the defendants have put in a general demurrer for want of equity.

Upon this demurrer it is not necessary to consider whether the plaintiffs are entitled to the particular relief prayed, but whether they are entitled to any relief; and being of opinion that the conduct of the defendants has been wholly unjustifiable, I overrule the demurrer for want of equity.

The defendants have, however, by their counsel demurred, *ore tenus*, at the bar, for want of parties who, they insist, are necessary in order to enable the court to do complete justice in this suit. The plaintiffs sue on behalf of themselves and certain other persons who are subscribers, together, of 1,690 shares, and who have executed a deed, stated in the bill, by which they assign to the plaintiffs their respective interests in this concern, and constitute the plaintiffs their attorneys to institute any action or suit, in order to give effect to their interests, or to enter into any compromise for their claims; but upon condition that, after deducting their expenses, the plaintiffs are to hold what they shall so recover or receive, in trust for the said other persons, respectively. Among many

objections for want of parties, the defendants insist that these other persons ought to have been named as parties to this suit.

The plaintiffs do not deny that, according to the general principles of a court of equity, these other persons ought to have been parties. But they urge at the bar, what is indeed stated in the bill, that these persons are very numerous, and that naming them as parties on the record would in all probability render it impossible for the plaintiffs to obtain a decree in the cause. This allegation may be very true. In certain special cases the court has adopted a practice which, by permitting one or more persons to represent in a suit all who have similar interests, has avoided the inconvenience which results from numerous parties. But it has never been stated as a general principle, that this course may be taken in all cases within the mischief; nor has it ever done in cases analogous to the present; and, if I were to yield to the reasoning here, I fear I should be doing what I have no authority to do, not following the practice of the court, but making a new practice. The demurrer *ore tenus*, therefore, for want of parties is allowed, but it is, of course, without costs.

In the argument in this case the 6 Geo. 1, c. 18, commonly called "the bubble act," was not adverted to, and in the view which I have taken of the case, it was not necessary to notice it; but in any future proceeding upon this subject it may be entitled to much attention.

¹BLAIN V. AGAR.

(2 Simons, 239. High Court of Chancery, 1823.)

In cases of fraud, courts of equity have concurrent jurisdiction with courts of law.

²**Status of original shareholders.** The holders of shares in a joint stock company, purchased immediately from the company, are entitled to relief in equity against the fraudulent conduct of the directors.

³**Unknown shareholders.** Some of the shareholders in a joint stock company may file a bill to have their deposits repaid without making all the other shareholders parties, if they are ignorant of their names.

¹ S. C. 6 M. R. 388.

² *Smith v. Fagan*, 1 M. R. 87.

³ *Von Schmidt v. Huntington*, 6 M. R. 284.

A demurrer to the original bill in this cause having been allowed, the bill was amended. The amendments consisted in striking out the name of one of the plaintiffs, naming three other shareholders as plaintiffs, omitting all mention of the indenture stated in the former report, and introducing an allegation that the plaintiffs were ignorant of the names of all the shareholders, except those who were parties to the suit. The plaintiffs in the amended bill held the same number of shares as the plaintiffs in the original bill, some of which they had acquired by paying deposits to the company, and the remainder by transfers made to them by other shareholders. The prayer of the original bill remained unaltered.

The defendants put in a general demurrer for want of equity, and also demurred, *ore tenus*, for want of parties.

The VICE CHANCELLOR

This bill states a case of fraud in respect of which a court of law will relieve, and it is no reason to prevent that relief being obtained in a court of equity, because it may be had at law; for in cases of fraud courts of equity have concurrent jurisdiction with courts of law. In *Colt v. Woollaston*, the master of the rolls says: "It is no objection that the parties have their remedy at law, and may bring an action for moneys had and received for the plaintiffs' own use, for in cases of fraud the court of equity has concurrent jurisdiction with the common law, matter of fraud being the great subject of relief here." And it does not appear that the judgment of the master of the rolls was founded upon the circumstance that the suit concerned land.

From the statements in the bill that have been referred to by the defendants' counsel, it is plain that the plaintiffs do mean to claim as being immediate purchasers, and as purchasers from prior purchasers, and as far as they sue in the latter character it is impossible to maintain the bill, but as original purchasers they do not stand exposed to any such objection.

This then being a case in which the plaintiffs are entitled to some relief in a court of equity, the demurrer, for want of equity, must be overruled.

Next with respect to the objection for want of parties. If there were not the allegation in the bill that the plaintiffs do

not know the names of the other subscribers there would be no substantial difference, as far as this objection is concerned, between the record as it now stands, and as it was originally shaped. But as the present bill contains that additional allegation, I am of opinion that the demurrer, for want of parties, is not sustainable.

CAMPBELL V. FLEMING ET AL.

(1 Adolphus & Ellis, 40. King's Bench, 1834.)

¹Condonation. If a party be induced to purchase an article by fraudulent misrepresentations of the seller respecting it, and after discovering the fraud continue to deal with the article as his own, he can not recover back the money from the seller.

Discovery of further fraud. A right to repudiate so lost is not revived by the subsequent discovery of another incident in the same fraud.

Assumpsit for money had and received. Plea, the general issue. On the trial before DENMAN, C. J., at the sittings after last Hilary term, at Guildhall, the plaintiff proved that in consequence of an advertisement in the newspapers he entered into a negotiation for the purchase of some shares in a supposed joint stock mining company, and upon representations made to him by the agents of the defendants, became the purchaser of shares to a large amount. After the purchase was concluded he discovered that the statements in the advertisement and many of the representations made to him in the course of the negotiation were fraudulent and that the whole scheme was a deception. The real sellers of the shares were the defendants. The action was brought to recover back the money paid for the shares. On the cross-examination of the plaintiff's witnesses, it appeared that subsequently to the above transactions, the plaintiff formed a new company by consolidating the shares originally purchased by him with some other property; and he sold shares in the new company, thereby realizing a considerable sum of money. Evidence was further given on the part of the plaintiff to show that at the time of the original purchase an outlay of £35,000 was represented to him to have been made by the supposed mining company in the purchase of property, which

¹*Day v. Holmes*, 2 M. R. 276.

outlay in fact had not amounted to £5,000, and that this part of the fraud was not discovered by him till after he had disposed of the shares in the new company. The Lord Chief Justice nonsuited the plaintiff.

F. POLLOCK now moved for a rule to show cause why the nonsuit should not be set aside and a new trial had. The plaintiff is entitled to recover the money paid for the shares the consideration for the payment having totally failed. No contract can arise upon a mere fraud, and the transaction upon which the shares were purchased is shown by the evidence to have been a fraud *ab initio*. Then it can not be said that the plaintiff by his subsequent proceedings has adopted the contract; for there never was any contract in existence. But supposing the plaintiff had adopted a contract, he was entitled to repudiate it on discovering a fraud of which he was before ignorant. Any act of the plaintiff which is relied upon as showing a waiver of his objection to the fraud must be shown to have been performed by him after full knowledge of that fraud.

LITLEDALE, J.—It seems to me that this nonsuit was right. No doubt there was at the first a gross fraud on the plaintiff. But after he had learned that an imposition had been practiced on him he ought to have made his stand. Instead of doing so he goes on dealing with the shares, and in fact disposes of some of them. Supposing him not to have had, at that time, so full a knowledge of the fraud as he afterward obtained, he had given up his right of objection by dealing with the property after he had once discovered that he had been imposed upon.

PARKE, J.—I am entirely of the same opinion. After the plaintiff knowing of the fraud had elected to treat the transaction as a contract, he had lost his right of rescinding it; and the fraud could do no more than entitle him to rescind. It is said that another fraudulent representation was subsequently discovered. I can not, however, perceive that the evidence goes far enough to show that such a representation was in fact made.

PATTESON, J.—No contract can arise out of a fraud; and an action brought upon a supposed contract, which is shown to have arisen from fraud may be resisted. In this case the

plaintiff has paid the money and now demands it back, on the ground of the money having been paid on a void transaction. To entitle him to do so he should, at the time of discovering the fraud, have elected to repudiate the whole transaction. Instead of doing so he deals with that for which he now says that he never legally contracted. Long after this as he alleges he discovers a new incident in the fraud. This can only be considered as strengthening the evidence of the original fraud, and it can not revive the right of repudiation which has been once waived.

LORD DENMAN, C. J.—I acted upon the principle which has been so clearly put by the rest of the court. There is no authority for saying that a party must know all the incidents of fraud before he deprives himself of the right of rescinding.

Rule refused.

FALLS ET AL V. CARPENTER ET AL.

BIRCHETT ET AL V. FALLS ET AL.

CARPENTER'S HEIRS V. FALLS ET AL.

(1 Dev. & Bat. Eq. 237. Supreme Court of North Carolina, 1835.)

Acquiescence in default of vendee. A vendee contracted for the purchase of land and took possession, but neglected to pay the purchase money. Vendor acquiesced in the delay by keeping the purchase money bonds, and otherwise. *Held*, that having allowed the contract to subsist after default, the vendor could not put an end to it without formal and reasonable notice to the vendee to come forward and fulfill.

Purchase by third party, in interim. Such purchaser may, upon tender before notice as aforesaid, demand specific performance from the vendor or call for the legal title from a third party purchasing with full knowledge of the contract.

Time is not of the essence of an executory contract for purchase of land where the delay has been acquiesced in and the vendee allowed to continue in possession, although sudden and immense value has accrued to the premises by the discovery of gold thereon.

Discovery of gold concealed by intervening purchaser. While the vendee was in possession, a valuable gold mine was discovered on the premises. A third party went to the vendor, from whom they concealed the discovery of gold, and also misrepresented the willingness of vendee to take the land, and the obligation upon vendor to convey. *Held*,

¹ *Youngman v. Linn*, 2 M. R. 443.

that an equity might exist against such third party, independent of the obligation of the vendor to make conveyance.

Insolvency of vendee is of itself no ground to rescind a contract.

¹ **Sudden appreciation, after election made.** Increase of value is not such a change in the subject-matter of a contract as is, of itself, a ground for rescission or to excuse non-enforcement; but if one of the parties refuse to perform, and *then comes a change of circumstances* upon the strength of which he is desirous to go on with the bargain, he may be properly repelled, although he was watching for that change.

Interested witness. Defendant liable to decree can not, by releasing to his co-defendants *pendente lite*, become a competent witness for them.

The original plaintiff, Falls, purchased in February, 1823, from the defendant, Frederick Carpenter, the elder, two adjoining tracts of land in the pleadings described, and executed his bonds for the purchase money, and took a covenant for a conveyance upon the payment of the price. He took possession but failed to make the payments; and there was on the 6th day of November, 1826, the sum of eighty-three dollars, forty-three and three quarter cents due for interest in arrear. He then applied to Carpenter to modify the contract by giving further time, and by agreeing to accept payment in grain or country produce in lieu of money, if he should be unable to raise the money; to which the other acceded. On this day, accordingly, that covenant and the bonds were destroyed, and Falls gave three new bonds—two for three hundred and seventy-five dollars each, payable at one and two years, with interest from the date for the purchase money, and the third for the balance of interest, eighty-three dollars forty-three and three quarter cents, due on the old contract; which last instrument provided that it might be paid in grain at specified prices, and that any excess of the grain delivered after discharging that bond should be applied to the other two. At the same time Carpenter entered into a bond in the penalty of fifteen hundred dollars to Falls, with condition to be void if Carpenter should, “at the payment of the two notes for three hundred and seventy-five dollars each, with the interest thereon, convey to said Falls the said two tracts of land” in fee simple, with general warranty as to one, and special warranty as to the other.

The original bill, filed September 11, 1829, by Falls, charged the contract of November, 1826, and that he was in possession under it, and made payments which satisfied the small bond,

¹ *Bean v. Valle*, 2 Mo. 127; *Post SPEC. PERFORMANCE: Henry v. Ecerts*, 5 M. R. 603.

and left the sum of one hundred and thirty-one dollars, besides interest, applicable to one of the bonds for three hundred and seventy-five dollars; and that in August, 1829, while the contract was in full force, a valuable gold mine was discovered on the land, which he and other persons under him began to work; that the defendants, Birchett and Ormond, were on the land and saw the plaintiff and his tenants collecting gold, and knew that he had purchased the land, and then claimed it, and was in actual possession; and that with knowledge of these facts, they, on August 22, 1829, without informing Falls of their purpose, went to Carpenter (who resided seventeen or eighteen miles off,) and proposed to purchase the same lands for themselves; that Carpenter refused to sell to them, unless with Falls' consent, or unless he could get up his bond to Falls; upon which they represented to him that the bond was not obligatory, because the purchase money had not been punctually paid; and also, that Falls was yet unable to pay it, and wished to rescind his contract; and pretended that they wished to purchase that the one might build a mill and the other set up a store, which he wished to do immediately, as his goods were already purchased; that Carpenter did not wish to keep the land himself, but to sell it; and believing those false representations, agreed to sell to them at the price of seven hundred and fifty dollars, which was immediately executed by their giving their bonds for that sum and taking a deed from Carpenter in fee; that during the treaty they concealed from Carpenter the fact that gold had been found on the land, and in answer to an inquiry by him on that point, denied it. The bill further charged that Birchett and Ormond entered into a part of the land and collected some gold, of which an account was prayed, and threatened to bring an action of ejectment, or otherwise expel Falls from the land which he had under cultivation or was working for gold. It also charged that between the 22d of August and the filing of the bill, the plaintiff had come to a settlement with Carpenter and ascertained the balance due on his bonds, and that he had fully paid the same and taken up the bonds. The prayer was for a conveyance by Carpenter, Birchett and Ormond, or those of them in whom the legal title was; and for an injunction and general relief.

Carpenter died intestate, after service of the bill, and before answer; and by a bill of revivor, and supplemental and amended bill, the suit was revived against his administrators, widow and heirs. And it was further charged, that the defendants Birchett and Ormond had sold and conveyed shares of the land to certain other persons who had notice of the plaintiffs' rights and were made defendants; and that Falls, before the filing of the original bill, had also assigned undivided shares to certain persons who were made plaintiffs with him.

The administrators were P. Manney and Frederick Carpenter, the younger, who was a son and one of the heirs of F. Carpenter, deceased. They answered and admitted the contract of November, 1826; the possession of Falls under it; the payment of grain to the quantity and value charged in the bill; the sale and conveyance to Ormond and Birchett and the subsequent payment by Falls of the balance due on his bonds, all as charged in the bill; that thereupon the intestate informed Falls that Birchett and Ormond had obtained a conveyance from him by inducing him to believe that Falls was unable to pay for the land, and that the contract with him was void: and offered then to make Falls a deed, which Falls declined accepting, unless that to Birchett and Ormond were first surrendered and canceled; that the intestate then sent the bond of Birchett and Ormond to them, by one Adderholt, as his agent, with instructions to tender it to them and demand the deed, which was done, but they refused. These defendants then submitted to any decree between the other parties, and to repay the plaintiff his money, or to surrender to Birchett and Ormond their bond, as the court might decree the land to belong to the one or to the other.

By an amended answer the administrators said that they had no personal knowledge of the transaction, and had before answered upon information, which they have since discovered to be untrue, and to have been imposed on them by the plaintiff and those interested with him; and they and the other heirs, and the widow of Carpenter, then stated the contract of February, 1823, and that of November, 1826; and that although some grain was delivered, they did not know how much, and believed not more than discharged the note

for eighty-three dollars forty-three and three quarter cents, or certainly that and the interest on the other bonds; so that the whole principal purchase money remained due in November, 1828, when the last bond became payable; and that no payment was made thereafter until the last of August, 1829, when Carpenter had sold to Birchett and Ormond. They stated that through the winter of 1828, and in the spring of 1829, Carpenter applied to Falls for payments, and insisted on them; and *that Falls was unable, or alleged that he was unable, to make any, and proposed to Carpenter to rescind the contract, which was then agreed to by Carpenter, and the contract considered to be rescinded*; that it was thereupon understood between these parties that Carpenter should make sale of the land for his own benefit, but that he should keep the notes of Falls, and the latter keep possession of the land until a new sale, and when such should take place, that a settlement should be made, and the notes and possession mutually surrendered; that, accordingly, Carpenter made several efforts, with the knowledge of Falls, to sell, and could not, until August, 1829; that on the 22d of that month Birchett and Ormond and one Robert Dixon, having ascertained that a very valuable gold mine (which has since turned out to be worth, probably, one million dollars,) had been just before discovered on the land, formed the design to purchase it on speculation, and applied to him for that purpose; that Carpenter wished time to consider of it; and that he was an old, weak and intemperate man, at no time well able to attend to business, and then sick in bed; that they represented to him that they were anxious to get the land for the purpose of building a mill and a store; and if they could not get it immediately they would not purchase at all; and both concealed and denied that gold had been found on the place; that thereupon Carpenter contracted with them, and conveyed the land to Birchett and Ormond, as charged in the bill; that he was induced to make the contract by the urgency of those persons in the belief that they really wanted the land for the purposes mentioned by them, and that they hurried him into the completion of it then, before a rumor of the existence of the gold mine could reach his ears, or he might have any other reason to suspect their motives.

The answer then stated that a few days thereafter, Falls and the plaintiff Wilson, who with others had formed an association to get a title and work the mines, offered to pay off the notes of Falls and demanded a deed; that he was confounded at discovering the fraud that had been practiced on him by Birchett and Ormond, and also at the demand of Falls and Wilson, and disclosed to the latter his true situation and embarrassment, and asked Wilson's advice what he should do; that they insisted on Falls' claim and repeated the tender of the money and advised him to take it as that could not make the matter worse for him; and that intimidated by their menaces and at their suggestion, Carpenter appointed Adderholt his agent to take advice and act for him, who attempted to get the contract with Birchett and Ormond rescinded but failed, and thereupon received from Falls and Wilson, in cash, a part of the sum due on Falls' bonds, and took the bond of Wilson for what they admitted to be the residue, but that Carpenter refused to accept from Adderholt either the money or Wilson's bond, or to make a deed to Falls, and overwhelmed with the perplexities of his condition soon after died, before he could answer the bill.

The defendants, Birchett, Ormond and Dixon, answered, and admitted the purchase and conveyance from Carpenter, for which they gave their bonds for seven hundred and fifty dollars. They stated that two or three days before they had seen persons digging and washing for gold on a piece of land, which they were informed and believed was vacant; that Dixon, who lived on an adjoining tract, so believed; that it was on the 22d of August, 1829, agreed between the three that they would enter the land they supposed vacant, and as they expected the vein of ore to run also into the Carpenter land, the line of which as they believed ran very near the spot at which the gold was found, it was further agreed by them to buy that land also; that Dixon went to the entry-takers to make an entry in his own name, on the joint account, and Birchett and Ormond proceeded to Carpenter's to make the purchase from him, and did so, taking the deed in their names, also on the joint account. They stated that they knew Falls had agreed for the land, but had understood and believed that he was unable to pay for it, and had before abandoned it;

which belief was founded upon the facts that Falls was notoriously an imprudent and insolvent man; that Carpenter had repeatedly offered the land for sale to Ormond and others, from the autumn of 1828 up to that time, declaring that he was absolved from the contract with Falls by his non-compliance, and that although this was generally known, they never had heard that Falls forbade Carpenter to sell; that they did not use any persuasion to induce Carpenter to sell to them; that they considered him to be the absolute owner, and knew that he was desirous to sell to raise money; and that, as soon as they made known their wish, Carpenter agreed to make the sale; that the remarks about Falls' claim came from Carpenter, who mentioned that he had a long time before agreed to sell to Falls but he was no longer bound, and "his bond was dead," because Falls had made no payment and never would be able; and because he, Carpenter, had sent to him the spring before to come and settle with him, as he was about to sell the land to other persons, and Falls neither paid anything, nor came to see him; they admitted that Birchett and Ormond did not mention to Carpenter that gold had been found, and said that the reason was, that they were not then certain that it was on his land, although they expected it would extend into it; they denied that they made any false representations touching the gold, and stated that Carpenter made no inquiries, but voluntarily said, during the treaty, that he hoped they might find gold in abundance; that Dixon also came to Carpenter's in the evening, when they were writing the deed, and upon being informed by Carpenter of the contract, remarked to him that he had better take care what he was about, "perhaps there's gold on your land," to which the other replied, "that he wished they might find the best mine in the country; he did not want gold mines as he was too old to work them, and wanted nothing but the value of his land or the money for his land." The answers then stated that these defendants entered into the lands immediately and began to work the mines, but were in a few days evicted under color of a summary process, for a forcible entry and detainer, by means of which, Falls, Wilson and the other plaintiffs got into exclusive possession; and, further, that on the 4th of September, 1829, the defendant Ormond, had sold and conveyed to the other defendant,

Dixon, his third, and that Birchett and Dixon had since associated with themselves the other persons named, who were made defendants by the supplemental bill, who also put in answers in which nothing material was set forth.

By a subsequent answer, Robert Dixon disclaimed, and the defendants Birchett & Co. exhibited a deed from him to themselves, dated the 3d day of May, 1832, with special warranty for all his share and interest.

Birchett and Ormond instituted an action of ejectment against Falls and others to recover the possession which was thus lost by them, and the trial of the same being delayed, Birchett and the assignees, in May, 1832, filed their cross-bill against Falls and his partners, in which they charged the two contracts between Falls and Carpenter, and that the latter was merely an extension of the time by reason of his inability to pay the purchase money and sought a discovery as to that fact and as to the particulars of those contracts.

The bill also charged that Birchett and Ormond had heard various reports, which were in common circulation, that Falls had wholly failed to comply with his contract and had abandoned it, and that they then became desirous of purchasing from Carpenter, as was generally known, and particularly by Falls; that on the 22d of August, 1829, or the day before, Birchett and Falls were on the land together, and that the latter then knowing of the intention of the former to purchase made no sort of objection thereto, but expressed his satisfaction therewith; that, in fact, Falls had told Carpenter that he could not pay for the land, and directed him to sell to any other person who could pay for it, to whom he, Falls, would surrender all claim, and that Carpenter so declared to them, Birchett and Ormond, at the time that he sold to them. The bill further charged that no person was in actual possession of any portion of the land, but one Arrowood, who attorned to the plaintiffs; and that they entered into the peaceable possession and continued it for a few days until turned out in the manner stated in their former answer, and that Falls and the other defendants got into possession and were making great profits and committing irreparable waste.

The prayer was for a discovery of all the matters charged; for an account of the gold already made and for an injunction against further waste or working.

All the defendants put in answers, but that of Falls was the only material one in the present state of the case, and none of the others were contradictory of it. That admitted the two contracts of 1823 and 1826, and that the last was substituted for the former at his instance, because it was more convenient to pay in grain than money. He denied that he was unable to pay for the land and said he could always have done so if pressed, but that Carpenter promised not to press him. That in the winter of 1826-7 he paid two hundred bushels of corn, and in 1828 more corn and rye, amounting altogether to two hundred and forty dollars; and in the spring of 1829 Carpenter applied to him for twenty-five dollars, which he had not by him, and he requested Carpenter to borrow and he would take up his note, and that he did pay Carpenter's note to John Falls for about twenty-six dollars, which was satisfactory to Carpenter. The answer denied positively any agreement with Carpenter to rescind the contract, or any abandonment, or any act or omission from which it could be inferred, or that he ever agreed that Carpenter should sell to any other person; and, on the contrary, stated that he was in actual possession of the land, claiming it under his purchase, cultivating and improving it and digging for gold, both he and his hirelings and tenants, and that Arrowood was one of his tenants, and had continued to work under him ever since. That it is true that on the 21st day of August, 1829, both Birchett and Ormond (the former of whom was a stranger to this defendant) were on the premises and saw Falls and his hands collecting ore, and became fully aware of its richness and the great probable value of the mine, and no doubt formed the design then of purchasing from Carpenter, and may have thought they would hold the land if they could get his deed, notwithstanding the contract with Falls, as they, after getting the deed, insisted on it as a good title, because it was the first, and a warranty deed, and said that Carpenter and Falls might settle the dispute upon their contract between themselves. But the answer denied positively that this defendant assented to or had the least knowledge of their intention to purchase, or even suspected it, until he heard in the evening of the next day, the 22d, that they had gone to Carpenter's for that purpose. The answer stated that both

Birchett and Ormond conversed with this defendant and neither of them intimated such an intention; but that, on the contrary, Birchett applied to him for a lease and denied that he subsequently expressed his satisfaction at their purchase, but so far from it that upon hearing that such was their business, he set off early on Sunday morning, the 23d day of August, to Carpenter's, to put him on his guard and prevent him from making a contract; that upon getting there, he heard for the first time that they had obtained a deed, and was also told by Carpenter of the misrepresentations (as charged in Falls' original bill) made to him by those persons as to gold being on the land, and also that this defendant was willing to give up his contract, and would have come with them and brought up the bond had he not been confined at home by sickness; and that upon Carpenter's expressing a desire to postpone a contract until he could consult this defendant, who was, as he considered, entitled, Birchett and Ormond assured him that he, Falls, had agreed with them to give up the land and all claim on Carpenter for his improvements; all which representations the answer affirmed to have been false.

The answer then stated, that, upon hearing the truth from this defendant, Carpenter declared that he had been imposed upon, and that he would never receive the money from Birchett and Ormond, and in a few days sent their bonds to them by his agent, Adderholt, and demanded his deed; that he, Falls, returned to the land and went the next day to work the mine, when he was prevented by Dixon, who claimed it under Carpenter's deed, and that thereupon he associated himself with Wilson and the other defendants as a copartnership, to receive the title and work the mines; that on the last day of August, Falls and Wilson offered to settle with and pay Carpenter, who expressed a perfect conviction that he had been imposed on respecting Falls' giving up or abandoning the contract and a readiness on his part to comply with it, but desired time to send to Birchett and Ormond for his deed, which he wished to get up, and that on their refusal he said that he would accept the payment from Falls, and did so, as stated in the bill on the 2d of September, 1829, it being then understood that Falls, Wilson and others would file a bill against Carpenter, Birchett and Ormond to have their deed

surrendered or obtain a conveyance. The answer then asserted that Falls was never out of possession of the land, but admitted that Ormond, Birchett and Dixon were in possession of a part of the gold mine for a few days, until they were evicted as alleged in the bill. The answer then set forth a statement of the number of hands engaged in the service of the defendants in working the mines, the gold collected and the mode of working it.

At fall term, 1832, the heirs of Carpenter also filed their cross-bill against Falls and those claiming with him, and against Birchett and those claiming with him, to rescind the contract with Falls, and also for a reconveyance from Birchett and Ormond and others, upon the ground, as to the first, that it had been abandoned by Falls not making the payments stipulated, and by reason of his insolvency, being unable to make them except from the great and sudden increase in the value of the land; and that it had been rescinded by express verbal agreement; and that Carpenter had been surprised into receiving the payment on the 2d of September, 1829, he being incapable of business from age, infirmity, ignorance and weakness; and that at any rate, as he had not made a deed to Falls, he ought not to be held obliged to do so, since the value of the lands had accidentally increased so immensely, and as to the latter, for the causes of fraudulent concealment and misrepresentations, and hurrying into the bargain and conveyance before set forth in the bill of Falls and others, and in the answers of the Carpenters thereto.

To this bill, Falls put in an answer substantially the same with that to the cross-bill filed by Birchett and others against him, adding, that when he went to Carpenter's in August, 1829, he carried and showed to him one of the best specimens of ore found in the mine, and made a full disclosure of its extent and richness, as far as then discovered; and that Carpenter was dissatisfied only with Birchett and Ormond for their deception practiced on him, but was perfectly satisfied with his conduct, and expressed his willingness to make him the title as far as he could; and that he received the payment on the 2d of September without the least influence or menace from any person, and voluntarily, because he thought it right that the deed to Birchett and Ormond should be canceled

and a conveyance made to Falls; and that he was then in the full enjoyment of his faculties; that the value of the mines was greatly overrated, for that shares of one tenth part sold several months afterward at three hundred dollars, and it was a subsequent discovery that enhanced the value to a large but uncertain amount; that when his bonds fell due, he owned unincumbered land in the county, besides that purchased of Carpenter, worth two thousand dollars, which was known to Carpenter, who neither wished to rescind the contract nor abandoned it, nor would have let Falls do so.

Birchett and Orinond also answered this bill to the same effect with their answer to the original bill of Falls and others, admitting, further, that their principal object in buying the land was the prospect of gold, and that the spot where the gold was then found (which they then thought was vacant) was included within the lines of the Carpenter land, which had been sold to him by the party, Robert Dixon; and stating also that that vein turned out to be of little value, but that several months afterward another of great value was discovered in another part of the land; that Carpenter expressly declared that he and Falls had rescinded their agreement; and that he readily contracted with them, and sent for Adderholt, his friend, and neighbor, and ordinary adviser, to draw the writings, who came and did so; and that before he executed them Dixon arrived and informed him that there was probably gold, to which he replied, "he did not care and hoped there might be; that if there was he did not want it, but wanted money to pay his debts and put his mind at rest;" that he was perfectly competent to business and had the assistance of his confidential adviser, Adderholt.

To the answers in each of the causes, replications were entered and a large mass of testimony taken by all the parties. The most important were the depositions of Adderholt, the person mentioned in the pleadings, which were taken several times by the parties respectively.

That witness stated that he was the friend and near neighbor of Carpenter, with whom he generally advised upon matters of business and on whom he called to do his writing; that he drew the contracts between Carpenter and Falls, and

that he knew that Falls paid corn and rye in 1827 and 1828, though he could not state the precise amount of his own knowledge; and that he also paid a note of Carpenter's to John Falls for twenty-six dollars: that it was agreed the small bond should be first paid, and any surplus should be applied to those given upon the last bargain for the price of the land. He further stated that on the 22d of August, 1829, Ormond came to his house and stated that he and Birchett had bargained for the land, and that Carpenter had sent for him to draw the bonds and deeds; that he went, and on the way asked Ormond if Falls was there, and he said not; that he then asked if they had the bond to Falls, to which he also replied, no; and that they had been to see him but that he was intoxicated continually. The witness then remarked to him that Falls or the bond ought to be there; and Ormond stated that Birchett was with him the day before, but that he was so stupidly drunk they could do nothing with him. The witness asked if they had found gold on the land, and Ormond said, not as he knew; and that he and Birchett wanted to set up a mill and store on the land. Upon their arrival at Carpenter's, the terms of the bargain seemed to have been settled; but Carpenter asked him what *he* thought of the trade; and upon his saying that he thought Falls or the bond ought to be there, Carpenter observed that he thought so too. Birchett or Ormond then said there was no danger, for as Falls had not paid his bonds, Carpenter's bond was void. When the deeds were drawn Carpenter hesitated to sign them and said he did not like to do so without Falls or the bond—when Dixon, who had then arrived, said that the bond was void and there was no danger. It was understood by all parties that Falls was then in possession, and the witness then heard of no other person who was. After Dixon's remark, Carpenter executed the deeds, and in a little time Birchett or Ormond asked how they were to get possession, to which Carpenter replied, "you must see to that yourselves."

Both Birchett and Ormond denied at that time that they knew of any gold on the land; and on that occasion Carpenter said he had no persons to work gold mines, and did not care for them, but he wished they might find one; that what he wanted was his money for the land which, he believed, he

could never get Falls to pay him; and Birchett and Ormond then said there was no doubt Falls would give up the land and come to a settlement. The witness stated that Carpenter was a weak man, and not very competent to business, from age and intemperance, and was not entirely sober on that day; and upon being asked why, as his friend, he did not postpone the business until the next day, he replied that he had great confidence in Ormond's integrity, and thought everything fair; and he himself became their surety in the bonds to Carpenter for the purchase money. The witness further stated that he had considered Carpenter's bond "dead," because Falls had not paid; and that he had several times told Carpenter so, but always advised him not to sell to any other person before he took it in; that this opinion was founded on the belief that the bond provided on its face that if Falls did not pay his bond when due, Carpenter should be discharged, but that upon seeing the bond, he found that he was mistaken. Two or three days afterward Falls and Wilson came down to pay Carpenter, who again sent for the witness to make a settlement for him. Carpenter complained of being deceived by Birchett and Ormond, and was unwilling to receive the money from Falls until he could get up his deed. They, however, made a statement of the payments before made, which discharged the small bond and a hundred and thirty-one dollars of the purchase money, besides nine or ten dollars allowed as interest for the payments in advance. Carpenter asked Falls to wait until he could send to Birchett and Ormond, which was acceded to; and the witness went with their bond, and requested them to give up the deeds, as Carpenter alleged that he had been imposed on, and wished to have no difficulty with Falls and Wilson. Ormond was then willing to surrender the deed, but Birchett and Dixon refused. That he returned, and on the second of September the settlement with Falls was completed, and Wilson paid six hundred and thirty-five dollars and sixty-two and a half cents in cash, and offered to pay the residue, but Carpenter requested him to keep it and give his bond, as he wished to keep that at interest. Carpenter delivered the money to the witness for safe keeping, but in a few days took two hundred dollars, and afterward lent the witness on his bond three hun-

dred dollars more; and the residue the witness paid to the administrators after his death. The witness stated that when he went to get the deed from Birchett and Ormond, the latter admitted that the conversations with Carpenter, before Adderholt was sent for, "were or might be sufficient" to make him think they would have brought Falls or the bond, if he had not been too drunk; and Ormond afterward acknowledged that they told Carpenter that they, Birchett and Ormond, would run all risks about the bond to Falls. Birchett also admitted to him that before he bargained with Carpenter he had tried to get a lease from Falls, and could not; but Dixon said it was not from Falls, but from one Crane who then had a lease from Falls.

It clearly appeared upon other proofs that Falls had been in possession from 1823 up to August, 1829, and that he or his tenants lived on the land and had parts of it in cultivation, and particularly, that some weeks before Birchett and Ormond's purchase he had applied to R. M. Crane (a witness for Birchett and Ormond) to borrow five hundred dollars to pay to Carpenter, saying then that he had paid about one hundred dollars toward the land, and if he could raise five hundred dollars more Carpenter would wait with him; and to induce Crane to make the loan, he offered to lease to him the land in dispute, and to mortgage other land worth twelve hundred dollars, and also this as a security, and did make a lease of part of the land to Crane; and also that on the 18th of August, 1829, he leased four acres to Riley Arrowood to be worked for gold; on which the lessee proceeded to work, and the ore was found which Birchett and Ormond saw.

Thomas Dixon, a son of Robert Dixon, who was a party, stated that he heard Falls say in the spring of 1829, that "he expected to give back the Carpenter land;" and also heard F. Carpenter, Jr., say, that in the spring of 1829 "his father had sent him to Falls to see if he would pay or give up the land, and that he got no money"; but he did not state that Falls agreed to relinquish the land.

Hugh Patterson stated that in the spring of 1829 F. Carpenter, Jr., brought a message to Falls, and witness saw them conversing but did not hear the particulars, and that next morning Falls said that "he must go up in a few days and

settle with Mr. Carpenter," but whether he meant to settle for the corn or pay for the land the witness could not state. A few days afterward Falls was very drunk, and was complaining of Dixon having gained an expensive lawsuit for land against his father, and said that he must give up the Carpenter land and try Dixon himself.

Jacob Starnes stated that several days before Birchett and Ormond purchased, Falls had made leases to Arrowood and others, and they proceeded immediately to work, and that those leases were publicly known; that on the day Birchett and Ormond purchased, Falls mentioned to the witness that "they had gone to purchase the land and gold mine in dispute."

John Hullett stated that in the fall of 1828, as he thought, though it might be in 1827, Falls delivered one load of corn to Carpenter, when the latter remarked: "You have come nearer paying the interest than I thought you had"; and the balance of interest was then stated to be between five and ten dollars; Falls said it was less than he had expected, but that he should never be able to pay for the land, and that Carpenter must sell it if he could, and pay himself; that no person was present but the witness and Carpenter and Falls; and this was the only payment he knew of.

Two other witnesses proved, that in October, 1828, F. Carpenter, Sen., offered to sell the land to Ormond, and said that Falls would not even pay the interest; and that in the spring of 1829 Carpenter again sent word to Ormond to come and buy the land, as he could get nothing from Falls; and F. Carpenter, the son, said that Falls would give up, and had told him to sell the land. Falls was not present at, nor informed of, either of these conversations.

To the discredit of John Hullett, many witnesses were examined who said that he was not credible, and other witnesses proved that the last payment was not made by Andrew Falls, the party, but by John Falls, who delivered four loads of corn in 1828, while Andrew was in South Carolina; and that the delivery of the corn by Andrew himself was in 1827.

Benjamin S. Johnston stated that a short time after the sale to Birchett and Ormond, Carpenter informed him that when they proposed to purchase they stated to him that Falls

had consented that they should, as they intended to establish a mill and store which would be convenient to him, residing on his own land, which adjoined; and that he, Carpenter, told them that he did not think it right to sell to any person after having agreed to convey to Falls; but that upon receiving the assurance before mentioned, and believing Ormond to be a very honest man, he thought he might do so; and that he would not have conveyed to Birchett and Ormond if he had not believed it was approved by Falls.

Richard M. Kee, a nephew of Carpenter, stated that two or three weeks before Carpenter died, and when he was "fully at himself," he stated to the witness that he told Birchett and Ormond that he had sold to Falls, who held his bond; and that Ormond replied they had seen Falls and he did not want the land and had told them to go and purchase; that he, Carpenter, would still do nothing until Adderholt was sent for, who said, when he came, he thought the bond for title was out of date; that putting confidence in Ormond and thinking the bond void, he made them a deed; but that he soon learned from Falls that he had not given his consent to Birchett and Ormond, and therefore he received payment from him and was willing to make the title to him.

Robert Dixon was, after his release and disclaimer, examined by Birchett and his associates, under an order subject to all just exceptions. He stated that those persons did not know that the gold found was on the Carpenter land but they believed it extended to it; and that he told Carpenter, before he signed the deed, that he, the witness, expected there was gold on the land, as some had been found on the piece he had that day entered, on the branch just below.

He also stated that in the winter before, at which time gold had not been found, Falls told him that he could not pay for the Carpenter land without selling a tract devised to him by his father, and that he would rather give it up than sell his father's old place. In a few weeks afterward, Carpenter told him that Falls had given him up the land to make his own out of it and desired him to let Ormond know it; and request him to come up and buy. Upon being asked whether Falls did not tell him that he had actually given up the land, the witness replied that he did not but only that he would have to do so.

There was also much testimony as to Falls' circumstances; in which the witnesses expressed opinions somewhat at variance. Upon the whole of it there was no doubt of his solvency. When he made the contract he had but little property and was a young man living with his father, who was a farmer in easy circumstances, and Falls could himself get credit from the general confidence in his honesty. He added somewhat to his property and contracted debts, and in the early part of the year 1828 his father died and left him lands and a slave, worth about two thousand dollars but somewhat incumbered; so that Falls' clear estate after discharging his father's debts and his own, exclusive of the lands then in dispute and the price to be paid for them, was, in 1828 and 1829, of the value probably of twelve or fifteen hundred dollars.

These cases were brought on and argued together at very great length by BADGER, for Falls and others; THOMPSON, of South Carolina, DEVEREUX & IREDELL, for Birchett and others; and by PEARSON and WINSTON for Carpenter's heirs.

RUFFIN, Chief Justice, having stated the pleadings and proofs as above, proceeded:

These three causes have been properly brought on and argued together; for nearly the same questions arise in each, and all those that are important to the rights of the parties appear upon the pleadings in the original suit.

The cross-bill of Birchett and Ormond is chiefly for discovering from Falls as to the matters set up by those plaintiffs in their answer as defendants to his bill. It charges only one new fact, or rather, puts that fact more distinctly and in a stronger light than their answer did. That is, that Falls was on the land with Birchett, and knew of his intention to purchase, and made no objection, but expressed his satisfaction. But the allegation is positively denied by Falls, and there is no evidence to sustain it. It would require very strong evidence to do so, for Birchett, within whose knowledge as well as that of Falls, it must, if true, have been, does not venture to state it in that way in his answer, but only in general terms, that they inferred he had abandoned because

Carpenter had offered to sell the land for several months, and they had not understood that Falls had forbidden him. The plaintiffs have examined but a single witness with a view to this point (Starnes); and he says only that on the 22d of August, Falls mentioned that those persons had gone to buy the land. But that does not tend to show his assent to the purchase, and is entirely consistent with his answer that he himself heard of their intention only on that day and after they had gone. It reached him as a piece of common information, and in the same way he may have mentioned it. His conduct immediately before and subsequent renders the assertion of the bill incredible. All the other parts of this cause which can oppose the relief to Falls, are involved in the original one, and may therefore be disposed of with that.

The cross-bill of Carpenter's heirs was probably filed principally to enable the plaintiffs therein to impeach the deed to Birchett and Ormond upon their alleged fraud, in case a decree should be refused to Falls in the original suit; and therefore Falls was made a party that it might appear that his interest had been put out of the plaintiffs' way. It brings forward no new matter against Falls; and if the matters charged and admitted or proved be insufficient to bar Falls from specific execution, still less will they authorize a decree that he shall give up the agreement. Equity may refuse to help either party and leave both to law, but there is no ground in this court to cancel a contract, fair in its origin, upon the score merely of default or abandonment. There can not be a case of that sort, upon which that relief could be asked in equity, in which the facts on which it was asked would not defeat an action at law on the contract. As a bill of discovery simply, it has entirely failed with respect to Falls, who denies that he had either rescinded or abandoned the contract. The plaintiffs can have no relief, therefore, upon it, if Falls should be found entitled to a decree in his suit; for if Birchett and Ormond practiced the grossest fraud in obtaining the deed—although it may affect the costs—it becomes immaterial to these plaintiffs as soon as their interest in the subject ceases, and it is shown to belong, in the view of this court, to the other party, Falls.

It may be remarked, however, that the case is much stronger

for Falls in the suit by the Carpenters than upon his own bill, because there is important evidence competent in the former, which he can not read against Birchett and Ormond in his suit, which is the testimony of Johnston and McKee as to the declarations of Carpenter, the father, after he made the deeds. Falls had a right to use those declarations, as against Carpenter, both to repel the imputation of abandonment on his part, and the charge of surprise on Carpenter's, which the bill of his heir says ought to prevent the acceptance of the money by him from being considered as a confirmation. We think, indeed, that there is no ground for the allegation of surprise, for it is clear to our minds, from the testimony of those witnesses and that of Adderholt, and from many other concurring circumstances, that Carpenter never considered the contract abrogated, or that he could honestly sell against the consent of Falls; and that he would not have sold without his consent, or supposed consent. He may not have known, and probably did not know, what remedy a court of equity would give on the contract; and may have thought that all Falls could have done, at any time, was to sue for the penalty, and that even that was then out of his power. But he had no idea that he had let Falls off, or that Falls wished to be off. He constantly meant to convey to Falls, if he could pay the money. He probably believed that Falls would not, after all his indulgence, stand in the way of a sale to another if it became necessary for Carpenter to have money and Falls could not raise it. But that was all. He had in his own mind gone no further, if even that far. That was the reason why he spoke of "the bond being dead," and at the same time inquired whether Falls was willing to give it up. Whether Falls could sue him or not, he had always a regard to the interest and wishes of Falls, and however deficient his knowledge of artificial equity, or whatever the grade of his intellectual capacity at the time may have been, he seems to have retained to the last that best kind of sense, which prompted him to be an honest man, and observe his contracts in good faith according to their substantial meaning, as understood by the parties. As against his heirs, therefore, the inference from these facts is strong that the contract was considered by the parties to be a subsisting one, and it is rendered conclu-

sive by the subsequent declarations, which are express to that purpose. That Carpenter was deficient in understanding to make a contract, or transact ordinary business, there is no evidence that will bear stating; much less that he was incompetent to acts proper to the performance of a previous fair contract. The argument that he was ignorant that the contract was not binding, and therefore his acts and declarations under the belief that it was binding ought not to be deemed a confirmation, is altogether fallacious. It is founded upon the cases of conveyances obtained by trustees, tutors or guardians.

They are voidable, and can not be confirmed by a second deed, unless the first deed was known to be not binding, and the second was intended simply to make it so. The meaning is, that the last shall not cure the vice of the first, unless it was intended to have that very effect, which can not be, if the maker thought himself obliged by the one to make the other. But that has no application to the case of a contract which has no vice, but was fair, in respect of which the only question is whether it continued to be a contract between the parties. Acts done under it establish its subsistence. They do not constitute a case of confirmation but of performance. There could not be a doubt, therefore, that in the actual state of the case, as against Carpenter, the plaintiff Falls would be entitled to specific performance if the legal title were now in his heirs.

Their cross-bill must consequently be dismissed as against Falls and those claiming under him, and with costs. That brings us to the inquiry, what relief he is entitled to, as against Birchett and Ormond, in the original suit.

That question was made in the argument to depend mainly upon the right of Falls to have called for a deed from Carpenter, upon the facts existing before, and on the 22d of August, 1829, as those facts appear upon the proofs, exclusive of the subsequent declaration and acceptance of the purchase money by Carpenter. Birchett and Ormond are purchasers who have not paid any money, and consequently stand in Carpenter's shoes, in respect to the equity of Falls, but that equity must be established against them by evidence that is competent against them. The court will consider the case in that

light, and throw out of view the testimony of Johnston and McKee, and the payment of the balance of the price.

The deposition of Robert Dixon must, for a like reason, be rejected upon this part of the case. Having released to his companions before Carpenter filed his bill, he was not made a party defendant to it, and his deposition was therefore competent for Birchett and Ormond against Carpenter. But it can not be read against Falls, as to whom the release *pendente lite* is a nullity, and who must have a decree against the witness, if he gets one at all. Indeed, his liability for the costs, although in discretion, would be a sufficient objection according to *Barret v. Gore*, 3 Atk. 401. That case has been questioned in some of the courts of this country. Nevertheless we approve of it, because it is a safe rule that a witness should be entirely disinterested, and in a case of this kind the court must, upon its settled principles, decree costs against Dixon, if any decree be made against him.

In the point of view in which the case is now to be regarded, the offers of Carpenter to sell to others, and the declarations of him and his son that Falls had agreed that he might do so, must also be put aside, because the knowledge of those circumstances is not brought home to the plaintiff.

It may be remarked here, however, that upon one ground Falls might be found, upon investigation, to have a substantive equity against those purchasers, distinct from that he might have had against their common vendor. Supposing that the contract had not been expressly rescinded, but that Carpenter thought that it had been abandoned by Falls, and under that impression sold to another, who contributed to produce or confirm that impression, and represented that Falls had abandoned expressly in favor of the person seeking the second purchase, it would seem to constitute a case of deliberate deception by active means for the sake of gain, which ought to deprive the purchaser of all the advantage, of his deed, and make it subservient to the interest of the party whose conduct and wishes had been misunderstood by him who made the deed, and misrepresented by him who took it. In this aspect of the case Carpenter's own interest

is to be considered as gone at all events, either upon his contract with Falls or his deed to the others; and the question is, to which of them ought it to go? Carpenter honestly disabled himself from conveying to Falls. He knew he had made default, and from that he may possibly have inferred that the contract was abandoned by Falls. He was ignorant that, in fact, it was not abandoned. But Birchett and Ormond knew, and fully knew, better. Their answer, indeed, states that Carpenter told them that the bond was void, and that Falls had abandoned, intending to imply a negative pregnant to the proposition that such remark fell from them. But they do not say that affirmatively; and the answer being silent as to that charge of the bill, the unequivocal testimony of the witness (Adderholt) proves it; and also, that Carpenter deemed it a most material circumstance that Falls was willing the other should buy. Admit that Carpenter might have insisted on the default as a forfeiture; yet if he did not, and would then have conveyed to Falls upon the footing of their former contract, in preference to conveying to Birchett and Ormond upon a new contract, against the wishes of Falls, ought not the last bargain—the price being the same in each—to be looked upon as having been made, substantially, in compliance with the first contract, as it was expressly, upon the supposed wishes of the party to that contract? Carpenter is put out of the way because he would not rely on Falls' default against him. Are the others in a posture to raise the objection simply because he might have done it, though he did not? Notice subjects them to all the equities against Carpenter, but their conduct may prevent them from being entitled to all his defenses against Falls.

Now, whether Carpenter told them that the contract with Falls was not binding, or they told him so, it is certain Carpenter would not have made them a deed, as the contract had not been actually canceled, if he had not believed that Falls fully assented to it. This they knew perfectly was not a fact, though they represented it to be the fact. They assign certain reasons why the opinion they attribute to Carpenter, that "the bond was void," and that Falls had abandoned, might have been deemed correct by them. But they could not deny a knowledge of other facts, notorious to them, that proved

conclusively that he had not, in truth, abandoned, though his claim might not have been valid in law. They knew that he was in possession; that he was cultivating a part of the land; that he had discovered gold, and was engaged in collecting it; that he had given leases to others for the same purpose, and above all, that he had refused a lease for a part to the very person who pretended that Falls was willing that he might take an absolute conveyance for the whole. They knew that he was not only able, but in a very short time would be ready to pay the purchase money; and that if he did, Carpenter felt himself bound (whether he was or not in law), to make the deed to Falls. Yet they hold out that he could not pay, and did not wish to have the land, studiously producing or confirming that belief. They got, then, the title from the person in whom it was vested, because that person was governed by the wishes of Falls, as having a prior claim—a claim which he was willing might be renounced, but also ready to recognize as the right, if asserted.

It would have been as beneficial to the claimant, and it was as effectually used by the other parties, as the most perfect right could have been. After pretending to be substituted to it, and thereby gaining the legal title, can they supersede the thus acknowledged right by the objection that it was not legally valid? It should rather seem that whatever it was before, it was thereby made valid as against them. But as little was said in the argument upon this view of the subject, the court has considered the case upon the points on which the counsel placed it and on which it will be decided.

The first objection on the part of the defendants would be fatal if founded in fact. It is, that the contract was expressly rescinded by a subsequent parol agreement. But to this allegation there is no evidence while it requires that which is clear, positive and above suspicion. Hullett's testimony comes the nearest to it. He states a proposition by Falls but no assent on the part of Carpenter. Besides the witness is mistaken as to the time; for more than a year after the one load of corn, which Hullett saw Andrew Falls deliver, four other loads were delivered for him (1828) by John Falls. The parties, therefore, acted on the contract after the time Hullett speaks of; which proves that it was not then rescinded. As

late as the spring of 1829, Carpenter sent for further payments, and the defendants have themselves examined witnesses who can go no further toward establishing even abandonment, than to state Falls' declarations about this last period that "he would have to give up the land," or that he "must give it up because he could not pay for it." The court must further declare that the contract was not rescinded by agreement between the parties; and that it was not expressly renounced or abandoned by the plaintiff Falls. Those declarations are only indicative of his fears as to what necessity or convenience might require him to do, and not of a past or immediate refusal to proceed on the contract; for he still continued to act as owner, and to strive to raise the purchase money by a mortgage of his other property. He is therefore entitled to the common decree unless other reasons render it unfit that he should have it.

The substance of the objections consists in the failure of Falls to pay the purchase money punctually, and in his insolvency, which rendered him unable to perform his agreement until the land rose in value, and then only out of the land itself; and in the great increase of value immediately before he offered to comply. The argument for the defendants did not distinctly proceed upon those grounds severally, as if any single one of them constituted a bar to the relief, though the principal proposition taken was the general one that time is material in equity, and is deemed of the essence of the contract, and therefore the relief must be refused; and the other circumstances were invoked to sustain that doctrine, by showing its reasonableness in its application to this cause. It struck us that it required the whole to make the argument plausible, and that if any one of the positions be false in fact or immaterial to the conclusion, the whole proposition must fall.

The allegation of insolvency is unfounded. There was no change in the circumstances of the plaintiff, except for the better, and he was fully able to pay the debt. Had he been insolvent, it would be a question how far one who contracts with a person, known by him to be in that situation, could, after an increase in the value of the estate, allege, for the first time, *that* as a reason for annulling the contract; or why a

court of equity should not give full effect to it. It might form a proper motive for inserting in the contract a clause that default should avoid it, and be a reason with the court for holding, in such case, that the provision was not formal, but substantial.

But when the vendor retains the title as a security, and also takes the bonds of the vendees, as a separate and absolute obligation, binding on the person, and recoverable without showing performance on the part of the vendor, and likewise deals with an insolvent person as if he were solvent, by leaving him in the articles, at large, as to time, it is not seen how the court can put a construction on the instrument, founded on the circumstance of insolvency, as indicative of the intention of the parties.

Insolvency, whether existing at the time of the contract or occurring subsequently, if continuing, so as to disable the purchaser from fulfilling his contract, may authorize the other party, after request and default, to renounce the contract; and after reasonable notice, may discharge him; or it may be evidence with other things, of abandonment by the purchaser. But, in that case, it may also be repelled by other evidence that there was no abandonment in fact.

Insolvency, by itself, does not dissolve the agreement, nor put it in the power of either party to treat it as dissoluble at his will merely. But it is useless to speculate upon the consequences of that circumstance, if it existed; it is not the fact, and therefore can not be brought to bear on the argument.

It is otherwise with respect to the increase in the value of the land, which, at any rate, will bring a great deal more in the market than the contract price. It might be well, however, to ask who now urges this fact, and whether that party can avail himself of it?

Carpenter's interest in the subject in litigation is excluded, as already stated; and the decree, as one for specific performance, if made, must be against Birchett and Ormond, who have the legal title. They are alone interested; and they bought *after* they knew of the increased value; Falls, *before* it was discovered. It is not a case of turpitude, in which equity will not interfere, but leaves the possessor to his advantage, because the other has no merit on which it can be

taken away; it is simply an objection that equity ought not to transfer so valuable an estate for so little money. Does that lie in their mouth when they were to give precisely the same sum, and had notice of the other's purchase? But not to speak of that, it is certain that the increase of value is not such a change in the subject-matter of a contract as is, of itself, a ground for rescinding or not enforcing articles. The thing contracted for, is, in equity, considered the purchaser's from the time of the contract, and stands as a security only to the seller. Ordinarily, therefore, advantages or disadvantages, arising subsequently, either from unforeseen accidents, or from contingencies on which the value was known at the time to be dependent, can not be a cause for refusing to enforce an executory agreement, more than for annulling an executed conveyance: *Paine v. Meller*, 6 Ves. 352; *Pritchard v. Ovey*, 1 Jac. & Walk. 403; *Revell v. Hussey*, 2 B. & Beat. 287.

What happens to the property, while the contract is in full force, can not alter the respective rights. If one of the parties refuse to perform, and there comes a change of circumstances, upon the strength of which he is desirous to go on with the bargain, and insists on it, he may properly be repelled, although he was not watching for that change; because a favorable chance ought not to profit him who would not run the risk of an unfavorable one. In like manner, if a loss arises by a fall in value of things of fluctuating price and subjects of traffic, and the vendor could not or would not make a title, according to his contract, in which case the purchaser might have avoided the loss, the former, having caused the loss, ought to bear it, and can not compel the other to take the property.

This brings us to the consideration of the grounds of decreeing specific performance, and of what is deemed a *fault* of the party, which shall defeat this relief.

It has been contended that the non-payment of the purchase money at the day, or at any rate, that circumstance, with any other slight one of inconvenience or loss to the seller, is a sufficient reason for refusing it; and that here, the delay and the change in value discharge the vendor. The jurisdiction was traced to its origin, and it was said that its

principle was to execute specifically, a contract legally valid; and therefore that time must be essential in equity, because it is at law; and many cases were cited, and minutely criticised. Certainly, the cases show that under a great variety of circumstances the court has refused the relief, when the party applying was in default in respect to the thing to be done by him, or in respect to the time in which the thing was to be done, and circumstances had then so changed, that performance by him would not put the other party in the same situation as if it had been done in due time.

On the other hand, the cases are as numerous in which the relief has been given where there was default in those respects, and a change in the title or value of the property, upon the ground of the conduct of the parties before or after the alleged default, occurred. We do not think it necessary to examine all the cases, nor to dwell much on the elementary principle; for we think the facts of this case are such that the decree we feel obliged to make will not be in conflict with a principle established or a precedent furnished by any one of the cases in the books.

What the court deems the material circumstances of the case, may be, in a great degree, gathered from what has been already said. But it may be well to group them together.

The plaintiff agreed to give seven hundred and fifty dollars for the land, and executed two bonds for the price, payable, with interest, at one and two years, the last of which fell due in November, 1828, and took a bond from his vendor to convey "at the payment of the purchase money." He went into immediate possession, or rather continued that derived under a former contract, and acted in all respects as owner without any objection on the part of the vendor up to the moment of the sale made by him to the other defendants, which occurred between nine and ten months after the last payment fell due. In the meantime he repeatedly made payments, altogether to the amount of two hundred and forty dollars, of which he agreed that a part should be applied to another debt, and about the sum of one hundred and forty dollars including interest, remained applicable to the debt for the land; and also, in the mean time he discovered a gold mine on the land, of parts of which he gave leases, and was exerting himself to raise money.

to discharge the balance on his bonds. The vendor did not wish him to give up, but wished him to complete the purchase. He had never renounced the contract, but had expressed, not to the vendor, but to others, the fear that he would have to do so, as he did not expect he could make the payments as soon as they might be wanting. We think these facts constitute the case of a contract partly performed, and in the course of execution and continuing, clearly by the consent of both parties. And we are of opinion that relief could not be denied in such a case, even if there has been a default, after it has been thus acquiesced in. There is no case to give countenance to a decree for the defendants.

It is not denied that time is material in equity. It is always respected here. Nor is it denied that time may be of the essence of a contract. Exact punctuality may be of great importance to the interests of a contracting party in many situations. In some it is obvious from the state of the property and other circumstances. In others, we do not doubt that the instrument may be so framed as to show what is true, namely, that it is a substantial part of the contract. In those cases, a court can no more dispense with that than any other vital provision. But the parties themselves can dispense with it; and the inquiry, where it has once existed is, whether they have dispensed with it. It is in that sense true, that time is not essential but immaterial, in equity, when comparing its effects here with that at law. It never was, and can not be regarded in both courts in the same light. It is true a maxim is found that equity does not decree performance of an agreement, upon which an action would not lie at law for damages, and anciently it was the usage to send the party to law.

But that was to determine whether the agreement was so constituted as to have become binding at any time—whether it ever was a legal contract; and not whether the party had lost his legal remedy by accident, or the non-observance of a provision deemed in equity merely formal. But the jurisdiction is established now upon the view of the court of equity as to what forms a sufficient contract, and it is beyond a doubt that some are so considered which could not be stated to a court of law, as for example, the cases of parol contracts with part performance under the statutes of fraud. And in respect

to time, so far from equity being governed by it as a conclusive bar, it was one of the earliest jurisdictions to relieve against it, as in the case of penalties. Suppose a day to be fixed for Carpenter to make a deed, and that he made after the day, at law the penalty of his bond might be recovered. Ought equity to allow that? Certainly not, and would not. It could not be tolerated that with the deed in his pocket Falls should say, "I stand upon the bond, and that every provision in it, time included, is of the essence." If he could not say that, how can the other party? Time with the conduct of the parties is material here, while the conduct of the parties is nothing at law. The law is necessarily confined to the time specified in the deed, because the declaration is on the deed *in his verbis*, not to be varied by another agreement or modified by acts *en pais*. But here the contract is for the thing which thereby becomes the property, and at the risk of him who contracts to get or take it, and the other party ought not to insist on its forfeiture for a slip, but only on compensation for the loss thereby arising to him. Interest on the purchase money generally places him in as good a situation, as if there had been no default. It is therefore the general doctrine in equity that time is not of the essence of the contract. In cases in which it is seen really to be essential, that is, where it must have been understood by the parties, at the time of the contract that events would probably happen in which interest would not be a compensation, because the title to the property or its value might be greatly affected by those events, and one of them holds back until the contemplated contingency happen, that person can not apply to enforce the contract which he has violated, and violated in bad faith, and as to a main ingredient of the bargain. Upon this principle rest the cases upon sales of reversions, stock and other uncertain interests or titles. To decree a specific performance in those cases to the defaulter would be to make a wager binding in favor of him who refused to put up his stake, because if he had put it up, the event proves he would have won.

Default in respect of the time is not therefore a bar of itself, except in peculiar cases; but is only evidence, with other things, of abandonment, and of course may be rebutted. It may in all cases be made essential, but where it is, it does not

follow that it is necessarily conclusive in equity, as it is at law. It can not be made thus conclusive here; that is to say, so as to preclude a party from showing that it ceased to be essential, as is the case at law from the form of pleading, and the mode of proof. But it is never to be forgotten that in equity a party may waive, and it may be shown that he did waive, a stipulation introduced into a contract for his benefit, whatever may be the subject or the terms of the stipulation. It was said, indeed, by the counsel for the plaintiff, that both parties must be active; and that, even if articles expressly state that the agreement shall not be binding unless performed at the time, a party can not avail himself of it, unless before the first default he give notice that he will take advantage of it. That would be going very far toward saying that time could not be made essential; for if the contract be not notice enough to the parties, it would be difficult for the court to perceive upon the same instrument, that it was essential. But a failure to avail himself of it, at the first fit occasion, and before or when the other begins after default, to act again on the agreement, may produce a very different result. He gives up, thereby, that part of the contract, as much as the other by his default, if insisted on, relinquishes the other parts of it.

Thus far we think it correct to say that both parties must be active. A small matter may amount to such waiver; anything that draws on the other party to execute the agreement afterward, or that shows it is deemed a subsisting agreement after the essential default. In *Seton v. Slade*, 7 Ves. 264, the purchaser's taking the abstract, although not bound to do so, and stating objections to the title, overruled his defense. In *Hudson v. Bartram*, 3 Mad. Rep. 440, Lord ELDON admitted the time to be of the essence of that contract, and it was expressed. Yet he held the vendor to be bound, because when the vendee excused his default by letter, he did not reply to it, and afterward referred a person entitled to a charge on the premises to the vendee, and avoided the vendee, when he subsequently sought him according to the engagements of his letter. The vendee could not assert the inconsistent rights of owner and vendor at the same time, and therefore the purchaser had a decree. If the party has been guilty of any unfairness, or his delay was with the view to test the

value of the bargain before he acted on it, or there is satisfactory evidence, from circumstances, that he once abandoned, or he has wholly failed to perform any part, and a loss has thereby ensued to the other party, in those cases the justice and the law are both manifestly against him that is in fault. Of one or the other of those descriptions, are all the strongest cases cited for the defendants.

In *Lloyd v. Collett*, 4 Bro. C. C., 469, the vendor wilfully delayed to furnish the abstract, though repeatedly requested, for six months after the vendee had sued for his deposit, and the subject was one of fluctuating price and an object of speculation, and had fallen. In that case it was said that a party's own neglect was a singular head of equity. Certainly it would be where, as in that case, nothing had been done. Hence Lord LOUGHBOROUGH, 4 Ves. 690, note, asks the plaintiff for a case to prove that where nothing had been done, the time was not essential. But nothing done on one side, and advantage properly and in due time taken of that on the other, is very different from part performance without any attempt to put an end to the contract by the other party, by notice of any sort.

To make that case in point here, "not every thing" and "nothing" must have one meaning. In *Brashier v. Gratz*, 6 Wheat. 528, the purchaser had done nothing. He could not take possession, for the property was in litigation which he was to manage, and for which he had received compensation. He was to have a special warranty, and in case the land should be lost, half the price was to be returned to him.

He became insolvent subsequently, and failed to pay any part of the price, and likewise failed to attend to the suit at all, and at the same time refused the vendor's offer to rescind. The vendor was then obliged to prosecute the suit, or lose the whole price. When gained, the land rose suddenly, and Brashier hired his purchase money on the credit of it, and tendered it and claimed a conveyance.

A decisive objection was, that he bought the title as a doubtful one, but would not take it as such, nor as long as the price he agreed to give was fairly the value, but claimed it when the title ceased to be doubtful, and the value increased greatly. It was a case, within the principles of those of re-

versions, where *nothing* has been done until the life falls in. In *Alley v. Deschamps*, 13 Ves. 225, there was a sudden unforeseen rise, but that did not govern the judgment; it only proved the dishonesty of the plaintiff's motives. Lord ERSKINE plainly went on the abandonment of the assignees. The purchaser took possession, and became bankrupt, after paying a less sum than the rent during the time he occupied. Bankruptcy is stronger than insolvency, because it is an absolute discharge, and it was once supposed to dissolve the contract, though it is now held otherwise: *Brooke v. Hewitt*, 3 Ves. 255.

But although the assignees might have claimed the benefit of the contract, they did not. They never entered into possession, and therefore were not liable for the purchase money, unless the vendor chose to come in under the commission, which they knew, of course, that he would not do. As soon as the value rose, and the assignees could certainly pay the purchase money out of the estate on which it was a lien, they wished to make themselves liable for it, and take the estate. No, said the Chancellor, you must not "lie by *with a view to see*, whether the contract will prove a gaining or a losing bargain, and according to the event, either to abandon, or considering the lapse of time as nothing, to claim a specific performance." The decision is nothing more than that a party can not elect to abandon or not, as it may appear hereafter to be his interest. He must decide at the proper time, and the decision once made is conclusive.

The bankruptcy alone did not discharge the contract, nor was the relief refused, because the value had increased. But it was because the whole price remained unpaid, and *nothing* had been done *after* the bankruptcy, which was an abandonment.

The present is not like the case of *Hatch v. Cobb*, 4 Johns. Ch. 559, which was much pressed at the bar. There was no acquiescence, but express notice that the vendor must sell again, and the purchaser had covered all his property by a recent judgment, and there was no separate security. All the vendor could do was to get his land again, and he gave the other the opportunity of paying for it, and keeping it. But this question could not arise in that case, because the second

purchaser was not a party to the suit, and the bill could not, at any rate, lie for damages alone. In *Benedict v. Lynch*, 1 Johns. Ch. 371, the purchaser was let into possession, it is true. But the contract for purchase was expressly rescinded, and a new one made for a lease for one year, under which the plaintiff enjoyed the term, and, moreover, he told the second purchaser, who inquired with a view to making a contract, that he held only for the year, and had given up his purchase. In *Harrington v. Wheeler*, 4 Ves. 686, the sale was of a reversion, and the vendee did not take possession, nor do anything until he filed his bill six years after the contract, and one year after the death of the tenant for life. This case is taken notice of in *Alley v. Deschamps* as one in which money was paid, but it hardly deserves that character. The vendee advanced one hundred and four pounds at the contract, but he took a mortgage on the estate for that, and just before suit demanded it as a debt from the second purchaser. Besides, the object of the sale was to pay off a heavy mortgage, which the plaintiff agreed to discharge, and the second purchaser, who was originally joint owner with the plaintiff's vendors, was, to save his own share from being foreclosed, compelled to buy the other shares, and discharge the mortgage himself. That case was therefore one both of bad faith and of unequivocal abandonment.

The present case, on the contrary, stands on the common equity of a contract, for an estate in possession. The purchaser is in arrear for a large part of the purchase money for nine months, but is fully able to pay it, and the vendor acquiesces in the default during the whole time, and then, without any notice whatever, makes a second sale to a person, with full notice, not only had before, but repeated to him at the time by the vendor himself. Having allowed it to subsist after the default, he can not put an end to it by an act, which, supposing it to subsist, is in violation of it, but to that end there must be a previous formal and reasonable notice that if the purchaser does not fulfill it, the other party will not hold himself bound. This would be the law if the purchase money was only secured by the articles, and the time specifically made essential therein.

It is much clearer when the vendor holds the bonds of the

other party, and does not offer to surrender them. Upon this agreement the time also seems to be as much at large as it could be, unless it had expressed that it should not be material and left the money to be paid during the purchaser's lifetime, unless hastened by request.

An objection was made to the assignments by Falls, upon the ground of maintenance or champerty. But a *cestui que trust* may surely assign when he or his trustee is in possession, which has been the case at every moment since his purchase. He has never been out of possession—and contracted on the land. The occupation of a small part by the others for a short time can not affect his conveyances, even if that could be regarded as tortious as against him upon the ground that they are only constructively trustees.

We think, therefore, that the plaintiffs in the original bill are entitled to the usual decree for specific performance, and to be quieted in the possession by injunction, and that Birchett and Ormond and those defendants who claim under them must pay the costs; and that the cross-bill of Birchett and Ormond must be dismissed with costs. Those decrees extinguish all claim of the Carpenters to the land, and consequently their cross-bill must also stand dismissed as against Birchett and Ormond and without the necessity of determining the question of fraud from their imputed concealment or representations touching the discovery of gold; but without costs to those defendants.

Decree accordingly.

PER CURIAM.

CLAPHAM V. SHILLITO.

(7 Beavan, 146. The Rolls Court, 1844.)

Representations as to thickness of coal beds. To bill for specific performance of agreement to take a lease of coal mines, defendant answered misrepresentations as to the depth and thickness of the beds, which are matters that are known to vary. The court made an issue to the jury whether any false representations were made, and whether if made they were relied on by the defendant, and the issue being found for plaintiff, the court refused to disturb the finding.

Rule to determine whether party has acted on the false representations made. The relative knowledge of the parties is to be considered.

and if the party to whom the representations were made resorted to the proper means of verification before he made the contract, it may appear that he relied upon his own investigations and not upon the representations made to him; or the circumstances may be such as to charge him with such knowledge as upon due inquiry was obtainable and such as to exclude the notion that he relied on the representations made to him.

¹ **Matters of inference or opinion.** Misrepresentations are to be considered with reference to the subject-matter; which may be uncertain, and all knowledge of it only inference of an uncertain nature.

This was a motion for a new trial of an issue directed by the court. The circumstances fully appear in the judgment.

MR. KINDERSLEY, MR. WATSON and MR. WRIGHT, for the defendant in support of the motion.

MR. TURNER, MR. KNOWLES and MR. ELMSLEY, *contra*, for the plaintiff.

THE MASTER OF THE ROLLS.

The bill in this cause was filed for the purpose of compelling the defendant, specifically, to perform an agreement which he had entered into, to take from the plaintiff a lease of certain coal mines. On the hearing of the cause, two issues were directed to be tried. 1. Whether, during the treaty for the agreement, any false representations on which the defendant relied were made by the plaintiff or his agents to the defendant or his agent, in respect to the mines or property comprised in the agreement. 2. Whether the defendant signed the memorandum at the foot of the draft lease under any false representations of the plaintiff or his solicitor, made to the defendant or his solicitor, in respect of the contents of the same draft lease, or any alterations made therein.

The plaintiff, in this cause, was also plaintiff in the issues, and on the trial a verdict was found for the plaintiff on both issues.

The defendant now, acquiescing in the verdict found on the second issue, has moved for a new trial on the first.

The coal comprised in the lease comprised beds of coal distinguished by the names of the Adwalton coal, the Middleton deep coal, and the Middleton little coal.

¹ *Kimmins v. Wilson*, 2 M. R. 159; *Chrysler v. Canada*, 90 N. Y. 272; 43 Am. R. 166.

In answer to questions put by the learned judge before whom the issues were tried, the jury stated that the plaintiff did not make any false representation to the defendant or his agent, as to the quantity of the Adwalton coal remaining to be gotten; and that the plaintiff did make false representations to the defendant, as to the depth of the Middleton deep coal from the surface, and as to the thickness of the Middleton little coal, but that Shillito or his agent did not rely on any such false representations.

The defendant alleges that the opinion expressed by the jury that the plaintiff did not make any false representation as to the quantity of the Adwalton coal remaining to be gotten is against the evidence which was produced on the trial; and that the opinion expressed by the jury, that the defendant or his agent did not rely on any false representations as to the Middleton coal, is erroneous and arose from some want of sufficient explanation of the meaning of the term reliance, which might have been, but was not afforded by the judge.

Having carefully read the judge's notes and the evidence in the cause, and considered the arguments of counsel, I am of opinion that there is no reason to disturb the verdict on the ground that the opinion of the jury respecting the quantity of coal remaining to be gotten in the Adwalton mine was against the evidence produced.

It was, indeed, against the testimony of Field, but having regard to the other evidence in the case, and the means which the trial afforded of testing the credibility of Field, I see no reason to think that the jury came to an erroneous conclusion on that point.

Upon the other point it appears to me that there is more difficulty. The jury were of opinion that false representations were made respecting the Middleton coal during the treaty for the agreement; and if we suppose that conclusion to be correct, it requires, at least, some consideration and explanation to show that representations found to be false, had not some influence on the defendant when he entered into the agreement.

Cases have frequently occurred, in which, upon entering into contracts, misrepresentations made by one party have not been, in any degree, relied on by the other party. If the

party to whom the representations were made himself resorted to the proper means of verification before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry and not upon the representations made to him by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded.

Again, when we are endeavoring to ascertain what reliance was placed on representations, we must consider them with reference to the subject-matter and the relative knowledge of the parties.

If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant and a contract is entered into after representations made by the party who knows or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed that the ignorant man relied on the statements made by him who was supposed to be better informed; but if the subject is in its nature uncertain, if all that is known about it is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge and means of acquiring knowledge, and equal skill, it is not easy to presume that representations made by one would have much or any influence upon the other.

Cases vary infinitely in their circumstances, and it is, I think, obvious, that a very great variety of circumstances may occur, in which it may appear that a contract was entered into, after erroneous representations made by one party, and yet without the other party having at all relied on these erroneous representations.

In the present case, it may be that the jury has correctly found that the representations made to the defendant respecting the Middleton coal were false, and not relied on by the defendant.

It does not appear that the closes of land containing the coal in question had been bored for the purpose of ascertaining what were the depth and thickness of the Middleton coal. The depth and thickness, at some distance, were known; but there were variations in the beds, and all that was known afforded only obscure and uncertain indications of the depth and thickness of the beds in particular closes, which had not been bored to the requisite depth.

Having regard to the nature of the subject, to the languages of the witnesses, and to the experience of the defendant's agent, to whom the representations were made, I can not, upon the mere statement of the evidence to me, avoid entertaining some doubt whether the representations made to Field were such as can properly be called false; and having carefully read, not only the notes of the evidence taken at the trial, but also all the evidence taken in this suit, and being without the benefit of any personal observation upon the witnesses under examination at the trial, I do not see any sufficient reason for thinking that the jury came to an improper conclusion.

In that state of circumstances, I have anxiously considered what was said at the bar respecting the summing up of the learned judge, and I am satisfied that the proper questions were fairly and sufficiently brought under the consideration of the jury. It is not alleged that any additional evidence can be adduced; and it appears to me, that in a matter, which in itself may have been somewhat doubtful—in which I have myself some doubt upon the finding as to false representations, and in which I agree with the finding as to the non-reliance of the defendant upon false representations (supposing them to have been made), I ought to be satisfied with the verdict upon the first issue.

I therefore refuse the motion for a new trial. The costs of the motion must be considered at the hearing on the equity reserved.

The cause came on for further directions, when specific performance was decreed, with the costs of suit, of the issues, and of the application for a new trial.

WARNER V. DANIELS ET AL.

(1 Woodbury & M. 90. U. S. Circuit Court, Dist. of Massachusetts, 1845.)

Facts allowing rescission after great lapse of time. Daniels purchased of Warner a farm worth \$6,000, paying him in stock of the Cleft Ledge Granite Company, which stock he represented to be worth the price of the farm. The quarry of the company had been bought for \$4,500, all or a part of it still unpaid, and secured by mortgage. Its purchaser had turned it over to the company at \$53,000, payable in the company's notes. It was in reality worthless. Defendant represented that it stood at par. The parties had met apparently by accident, but really upon a concerted scheme of defendants. The sale of the farm was induced by the fraudulent statements of certain facts and the concealment of other facts by defendants. No steps were taken for relief for about four years, complainant not knowing that he had a remedy, but meanwhile neither the stock nor the farm had changed materially in value. *Held*, that the difference between the supposed and real value of the stock was not of itself sufficient to base rescission, but that the active fraud of defendants was sufficient for such purpose, and that to such fraud the delay in time was no bar.

¹**Inadequacy of consideration without fraud.** Gross misconception of the value of a purchase is not sufficient to set the purchase aside, where the means of ascertaining the value are left open to the vendee, and there has been no deception practiced by the vendor.

Matters preventing equitable relief. Where the facts justify equitable relief, the only matters barring such relief are, 1, great and unexplained delay in seeking it; 2, the existence of adequate relief at law; or, 3, such a position of the property in controversy as to render it impracticable to grant redress.

Burden of proof to show the legality of corporate organization, considered.

²**False representations based on mistake.** Representations both material and false will vitiate a contract, although a fraudulent intent be wanting, as in case of representations made on mistaken belief.

Length of time, short of the Statute of Limitations, is sometimes a bar; but not if fraud exists, or if the delay is accounted for.

Practice on rescission where reconveyance is impracticable. When a mutual and complete rescission can not be had, equity will decree it *pro tanto*, and as to the balance allow damages. It will order a transfer of the property given as consideration on both sides, or from one side only, if the other can not be reached—with an account of damages.

This was a bill in equity. It alleged that on the 19th of November, 1836, the complainant was seized of a farm in Wrentham, in this State, worth \$6,000; that Daniels and Fales then held what purported to be certificates of shares in

¹ Penniman v. Winner, 2 M. R. 449.

² Dale v. Roosevelt, 6 M. R. 369.

the Cleft Ledge Granite Company, in New Hampshire, valued at \$6,000, the company having a capital paid in of \$200,000; that they proposed to purchase said farm of the complainant for a valuable consideration, and pay him in shares of said company; but in order to induce him to make the exchange, they averred that the stock was worth its nominal value in Boston, and more than any Boston bank stock; and that it would pay a handsome dividend next spring; and if the quarry was worked would yield 100 per cent. on its value; that they wanted the farm for the silk business; that they owned a brig employed in carrying stone, and wished the complainant, formerly a sea captain, to command it, by which he would make \$1,500 a year; that they owned some other vessels employed in the same business; had a number of contracts for furnishing stone, and one with the government for \$100,000; that several persons from Newport had bought into the company, and that Colonel Bates and various other men were employed by it, and large contracts, through their influence, were likely to be obtained at Newport and Portsmouth in behalf of the United States. The bill next alleged that, relying on these assurances, he entered into an agreement with the respondent, Daniels, who was then acting for himself and Fales, to convey to him the farm for \$6,000, to be paid for in said shares at the price per share which should be paid in per share when the deed was executed; and that still relying on the aforesaid assertions of Daniels and Fales, the complainant, on the 8th of December, 1836, made a warranty deed of the land to Daniels, and received from him therefor a number of papers purporting to be certificates of 240 shares in the Cleft Granite Ledge Company, representing \$25 each of its capital stock, amounting by computation to \$6,000, and which were the only consideration paid to him by Daniels, and were received on the supposition that \$25 had actually been paid in on each of them.

The bill further alleged that the company never in truth had anything paid in on said shares or any of its capital; that it was a mere fiction, got up to defraud the public; that the stock never had or could have any value; that the certificates therefor were false and fraudulent, and so known to be to Daniels and Fales, and that they were aware that the asser-

tions made about them were false and with intent to defraud the complainant. Moreover, in order to "bewilder" the complainant, and prevent him from causing the conveyance of the farm to be annulled, it was averred that Daniels, on the tenth of December, 1836, executed a mortgage deed of the farm to Elisha F. Fales, a brother of J. E. Fales, purporting to secure a note of the same date to him for \$1,765, and for the same purpose on the ninth of October, 1837, Daniels made another mortgage thereof to S. B. Scott, a co-partner in trade, and brother-in-law of Daniels, to secure a note of the same date for \$4,200; and it was charged that the mortgagees conspired with Daniels and Fales to enable them to complete their imposition on the complainant, and took the mortgages without any *bona fide* consideration passing between them; and prayed that they be made parties to the bill.

The bill alleged further that, notwithstanding all these falsehoods and frauds, the respondents had refused to yield any relief; had cut valuable timber from the land; had declined to get the mortgages discharged and to recouvey the land or to pay rent for the same or pay to him the nominal value of the shares; and therefore it put them to answer certain interrogatories under oath, and concluded, praying a decree against them for the \$6,000, and interest since the original conveyance, or to have the mortgages canceled and the land reconveyed with payment for the strip and waste and rent. A prayer was also interposed for an injunction against waste during the pendency of the bill and the appointment of a receiver of the rents.

The answer of Daniels admitted that Warner once owned the land, but denied it to have been worth even \$3,000, and averred that he and Fales being in Wrentham about the time named in the bill, accidentally, without any previous concert or design, heard that the complainant had a farm to sell, and expressed a willingness to buy it, if they could be allowed to pay for it in their way; that they examined the farm, and informed him they had no means to pay therefor, except in shares of the Cleft Ledge Granite Company, but denied that he exhibited more than one certificate of said shares, or any papers showing it had a capital stock paid in of \$200,000, or that said stock was alleged to be of par value, or would pay a

handsome dividend, or that the farm was wanted for the silk business, or that the company owned a brig, etc., and extended the denial to all the averments of that description set out in the bill, and to any other of like tenor, said to be made either by him or his agents. The answer then proceeded to allege that in August, 1835, Daniels purchased about 300 acres of land in Maine, for which he gave \$8 per acre, paying one quarter in cash and the rest in three annual installments, and in October, 1836, sold three quarters of his interest in the same to Joseph Fales at cost, taking in payment therefor Fales' obligation for \$5,249 in Cleft Ledge Granite stock, and the balance in notes of that company, and that in his first interview with Warner he informed him of this obligation from Fales, and left with him a copy of the act of incorporation of the company, and the by-laws and list of officers thereof, and a report of Doctor C. T. Jackson, a distinguished geologist, as to the quarry, and stated only the truth on the subject. The answer further declared that the respondent, Daniels, informed the complainant he was but little acquainted with the value of the stock, but that Warner could visit Boston and ascertain its value, and go to Durham and examine the quarry before trading, and if then concluding to make the exchange might find him at the Lamb Tavern in Boston. That in about a week after Warner did visit Boston, and said he came to inquire into the value of the stock; but little passed between them, till the next evening he informed the respondent that he had conversed with the president of the company, and was willing to take the stock at par value, if the price of the farm could be mutually agreed on; that the parties spent nearly two days in settling the price at \$6,000, being much beyond the true value in consequence, as the respondent avers, of false and exaggerated representations of the complainant, and that in the course of the conversations then had, the respondent learned for the first time from the complainant that the quarry had been purchased originally for \$4,500 by some individuals connected with it, and then sold to the company for \$53,000, the latter giving notes on time for the consideration, and which must be paid before a dividend could be made; that this would take a long period, and the holders of the notes must receive stock in payment, or it must be sacrificed in the

market to pay the notes; that the quarry might not prove as good as it now appeared, and urged these facts, not before known to Daniels, as considerations to induce him to give a larger sum for the farm in exchange for the stock at par; that thereupon he decided to give the \$6,000, payable in stock at par, and a bond was accordingly drawn to secure the fulfillment of the bargain; that Fales had no agency, or instructions, or part in the business; that on the 8th of December, Daniels, having received from Fales 240 shares in said company, made out to Fales, and by him assigned to Warner, proceeded with it to Wrentham, and Warner caused a deed to be executed to him of the farm on receiving the shares aforesaid; and declared at the time he knew all about the stock, and more than the respondent; that no complaint was made to him by Warner about the trade, wishing to annul it, till August 18, 1841.

The answer stated next that Warner, on the 16th of March, 1840, parted with all his stock except 24 shares; that he has no reason to believe the company to be a fiction, got up to defraud, but believes it possesses a valuable quarry of granite in Durham, N. H., examined and so reported by Dr. Jackson; that the quarry was bought by four persons in the fall of 1835, viz.: J. E. Fales, J. C. Thompson, James M. Thompson, and Newell A. Thompson, for \$4,500; that about \$3,500 were afterward expended on it in roads, wharves and shops employing near fifty men there before they sold it to the company, and fully testing the good quality thereof; that several persons not interested there, united with those four in petitioning the New Hampshire legislature for an act of incorporation; and on the 10th of June, 1836, they were duly incorporated, and on the 25th of August ensuing, purchased the quarry for \$53,000, payable $\frac{1}{4}$ in one year and $\frac{3}{4}$ in annual installments thereafter; that the capital stock was divided into 2,000 shares, at \$100 each, and on the 4th of December, 1836, only 303 shares had been issued on which 30 per cent. had been assessed and paid; that on November 28, 1836, it was agreed to increase the number of shares to 8,000 and to reduce the par value to \$25 each; that the old certificates were to be renewed, and that on the 7th of December, Fales being the holder of 73 shares of old stock, surrendered them for

240 shares of the new stock, paying the difference by cash \$10, and \$3,800 indorsed on the note he held against the company; that these are the same shares sold to Warner, and were paid for by the respondent by giving up to Fales his obligation before named for \$5,249, and the balance by a note, of which \$400 was since paid in cash and the rest by a note of Fales bought of a third person by Daniels; that Daniels has never mortgaged the land to *bewilder* Warner or defraud him, but for *bona fide* debts since paid; and the mortgage of one debt was discharged about the 1st of February, 1842, before the filing of the bill in this case, and the other about the 25th of September, 1841, and denied all collusion with the mortgagees to defraud Warner, and all false statements in any way concerning the stock. The answer then proceeded to reply to the different interrogatories in detail, in the course of which it was averred in addition to what has already been stated, that he owned no stock in the company before the 240 shares, nor any since except 40 shares; that the sums paid to the company by the stockholders are unknown to him; but he has been told and believes they have been \$12,900 or \$6,900, besides the \$6,000 worth in dispute in this case. The old shares issued are stated to be 230, and the new 240. Most of the assessments and shares appear to have been paid by indorsements on notes the company owed, or for services done the company; and the cash for all does not seem to exceed from \$100 to \$1,000, though some more is claimed.

The answer of J. E. Fales accords in substance, so far as he knows anything, with Daniels' answer, and denies all joint interest in the subject-matter, or any co-operation together in the trade, or any agency on his part in it, for Daniels or himself, though admitting he was one of the original purchasers of the quarry, and a member of the company, and director, and under contract to convey shares to Daniels at his first interview with Warner, and so informed the latter; and that Colonel Bates was their agent at a salary perhaps of \$1,200, but not \$1,500, and had a clerk and a large number of hands employed, and was negotiating for various contracts; but denies he said any had been made except at Portsmouth, or that any persons at Newport were imploring contracts, though he admits he stated that several persons there had bought into the

company; that when Warner came to Boston, some days before the 28th of March, 1836, Fales, at his request, introduced him to the president and clerk of the company; but denies interest in the sale to him, or in the farm, or any misrepresentation then or before as to the company or its property, and denies that the company was a fiction, but avers that it originated and was organized and bought the quarry as before described; that there was nothing in the manner of conducting the company designed or likely to defraud; that at the time of this transaction the quarry was worked and a large quantity of stone sent to Portsmouth and New York, and large sums received therefor, and more stone was got out, which was attached by one of its creditors; that the first assessment on the shares was \$25 and the next \$25, and the certificates were not issued till the assessments were paid; that at the time of the trade he did entertain and express sanguine *opinions* in respect to the value of the stock; that it was worth its nominal value, and would pay a handsome dividend; and so Warner professed to think after making certain estimates; that he said nothing about a brig or vessel to be commanded by Warner till near a year after the sale of the farm; that the land he obtained of Daniels for the shares was valuable, and its cost can be realized from it; though he has since taken the benefit of the bankrupt law in Massachusetts.

The answer of E. F. Fales and Scott accorded in respect to the mortgages to them with what was stated in Daniels' answer.

Exceptions were filed to the answers of Daniels and J. E. Fales, for alleged omissions and evasions, and they both put in amender answers, Daniels denying that he furnished to Warner any estimates of the value of the stock, or stated as a fact its value, but averred that he insisted to Warner that he must inquire and decide for himself, and buy on his own judgment, if at all, and that Warner did inquire and knew as much about its value as any one; that Daniels and Fales were not looking for a farm when the first interview took place, but the complainant applied to them to buy; that no mortgage remained on the Maine land sold to Fales which prejudiced its value, and the consideration promised by Daniels for it had been paid, to the extent of \$4,000, before the

sale to Fales, and the rest since; that if the shares are now worth less than they were in 1836, it is owing to the general change in trade and enterprise, and their value in 1836, as compared with the farm, was better known to Warner than to Daniels, and for aught Daniels knows, is now equal to the value of the farm; that since the trade with Warner, he has purchased 54 shares more in the company, of Newell A. Thompson, at \$25 per share, by taking them at par in part payment of some land sold to him; that Fales appears by the books to own since, 135 shares more, but how he obtained or paid for them is not known to the respondent, Daniels; that the company had, in December, 1836, besides the property before stated, tools, carts, a blacksmith's and hammering shop, and various blocks of granite partly hammered, all of several thousand dollars in value.

Fales in his amended answer adds only the following facts, which it is deemed material to state, viz.: that the company commenced issuing shares on the 24th of October, 1836; that on 19th of November, the company owned the quarry and farm connected therewith and buildings, wharf, forges, tools, shops, carts, several yoke of oxen, etc., and the real estate subject to a mortgage for the purchase money; that a large part of the purchase money had been paid for by the proceeds of the stock sales at that time and valuable additions made to the means of the company by aid and credit from individuals and all had been duly appropriated; and that this was the subject of conversation with Warner when he came to Boston to inquire; and as the operations and organization were new, the value of the stock lay rather in estimates and opinions of what would be yielded thereafter than the intrinsic value of the quarry; that Daniels had paid \$10,000 toward the Maine land, sold to him before their trade, and has since removed the mortgage then on it for the balance of the consideration; and that Fales at once took possession of that land, and exercised acts of ownership over it till sold by him in 1837; that one half of the original purchase money for the quarry had been paid in cash before Warner's trade and the balance was secured by mortgage; that \$40,000 of the second purchase had been paid and the rest secured by a second mortgage, and all this was made known to Warner before his trade.

The evidence in the case was voluminous, and will be further referred to in the opinion, so far as material to the facts which are found to be proved satisfactorily and which bear on the points of law decided by the court.

The case was argued at great length at the October term, 1845, by JONATHAN P. BISHOP and GEORGE M. BROWN for the complainant, and BENJAMIN R. CURTIS for Daniels, and FREDERICK W. SAWYER for Fales, the respondents.

WOODBURY, J.

There was preliminary objection in this case as to the competency of the testimony of Scott and Gilbert, and G. C. Thompson that must first be examined. Scott was brought in to defend, after the institution of these proceedings, on account of a mortgage of the premises to him by one of the respondents. But it is now admitted, as well as proved, that his interest ceased before the bill was filed; and he denies, as do the rest of the parties, any collusion or combination with Daniels; and there is no witness in the case testifying to the contrary. It is proper, then, to say in the outset, that not being responsible at all nor interested when he gave his testimony, it ought to be and is admitted: 1 Barb. Ch. P. 26; *Murray v. Shadwell*, 2 Ves. & Beam. 401; *McDonald v. Neilson*, 2 Cow. 139. If he was interested he could not testify for his co-defendant: 3 John. Ch. R. 612. The objections to Gilbert were, that a copy of the interrogatories was forwarded to him beforehand. But this does not render him incompetent nor make his testimony inadmissible, as no comments accompanied them, and if they came from the respondents, the latter neither dictated nor wrote the answers, nor used any influence to shape them into any particular form. The letter to Thompson merely requested him to tell the truth without any suggestion as to what the writer of it considered the truth. The evidence of all of them is then properly in the case.

The grounds set up for relief on the merits, are, first, on account of an important mistake as to the value of the shares received in payment for the farm by the complainant; and secondly, on account of fraud, false representation and imposi-

tion by the respondents in making the exchange of the shares for the farm. In respect to the first ground, I do not think it tenable on the facts of the case here, though it is often a good ground for interfering when well supported. See cases in 3 Cow. 537; 14 Ves. 288; 2 Ves. Sen. 627; *Rosevelt v. Fulton*, 2 Cow. 129; *Daniel v. Mitchell*, 1 Story, 172. I doubt its validity here, because, great as was the acknowledged difference between the real value of the shares, and that supposed by the complainant when he took them, being, as some of the witnesses testify, from nothing to a par value, yet he had means of avoiding much of the mistake, if there had not been falsehood and fraud. He was referred to the officers of the company, and to a personal examination of the property of the company, and allowed time for the purpose of full inquiry, and actually did consult the officers, as far as he deemed it useful to consult them. He relied then rather on the means pointed out and used by himself to get information as to most matters, than on the statements alone of the parties; and in such cases, generally, if a mistake as to a material fact occurs, without any fraud or falsehood on the part of the respondent, no relief can be granted on account of the mistake alone: *Daniel v. Mitchell*, 1 Story, 172; *Hough v. Richardson*, 3 Story, 659; *Atwood v. Small*, 6 Clark & Finn. 523, note; *Moffat v. Winslow*, 7 Paige, 124. It is true that the facts connected with his examination into the matter, tend strongly to sustain the idea that the difference between the real and pretended value of the sharee, in the rash and speculating mania of the times in 1836, could not then be detected by anybody so easily as now. Besides, the times being so "out of joint," a mistake in the value, however great, could with difficulty, even after a very full scrutiny, have become manifest to one who, like the complainant, seemed so infatuated, and so bent on cheating himself. Under the general delusion which then prevailed, and the plausible mode adopted by the respondents to make the complainant seem rather to go forward than they, he acted on that occasion with what seems now an apparent determination to be duped, which would almost justify placing him under guardianship. Such circumstances rendered a mistake almost inevitable. But it is still doubtful whether it is remediable,

when the means of judging were so opened to him, if no deception had been practiced upon him, no concealments, exaggerations and falsehoods, which he had not the means to detect readily, nor the keenness to suspect or expose, and hence became their victim.

This brings us to the second ground for relief—fraud or imposition. In order to sustain that, the whole circumstances of the case, as well as the positive testimony and the character and relations of the parties, are all proper subjects of consideration. Courts of equity can go more on what is called presumptive evidence than those of law: 1 Story Eq. Jur., § 190; *Rosevelt v. Fulton*, 2 Cow. 129; *Neville v. Wilkinson*, 1 Bro. Ch. C. 543, 546.

After examining all the facts in the general aspect, and then in detail, if the conclusion follows clearly that the complainant has been overreached, and that in some material degree, by impositions or concealments or misrepresentations by the respondents, on which he properly relied, he ought to be relieved: 1 Story Eq. Jur., § 192, 222; 7 Paige, 124; *Colt v. Woolaston*, 2 Peere Wms. 154; *Blain v. Agar*, 1 Sim. 37, 45; S. C., 2 Sim. 289; 1 Sch. & Lef. 429. Nothing should in that event prevent relief, but great and unexplained delay in seeking it, or an adequate and ample remedy at law, or a condition of the property in controversy, which renders it impracticable for the court, on any sound principle, to grant redress.

The great feature of the whole case is, that the complainant, in 1836, from being a wealthy and prosperous farmer, is stripped of the whole by the respondents, through the transaction complained of. There does not seem to have been in him the imbecility of mind which, though not idiocy, makes one liable to imposition, and calls aloud for the aid of a court of equity: Story Eq. Jur., §§ 237, 238; *Willis v. Jerneyan*, 2 Atk. 251; *Huguenin v. Baseley*, 14 Ves. 273, 290. Nor does he appear to have been a man rash in character, or inexperienced in business; and the difficulty in the outset, under these facts, is to find any reason for this catastrophe, except in some fraud practiced upon him in making the contract. Many circumstances in the transaction, whose truth is admitted, were calculated to mislead a common observer, such as the first inter-

view seeming to be accidental, and not apparently sought by Daniels and Fales; such likewise as their referring him to the officers of the company for full information, and not hurrying the bargain; such as the reluctance of Daniels to exchange his stock for the farm at so high a price; and the respectability of the president and treasurer and the agent at Durham, and the geologist who certified, with the large number of persons employed, and the important contracts said to be negotiating or made by a company apparently authorized by law and duly organized, and with so much capital represented to have been fairly paid in.

But, amidst all this plausible exterior, it was a fact that the person introducing him to Daniels and Fales was a brother-in-law of one of them, and that the brother of that person was an owner of some of the stock, as is disclosed since his death. Yet neither of these circumstances appear to have been known to Warner. That the company was incorporated so as to appear larger and more imposing than it really was, by including in the charter several persons, not original purchasers of the quarry, nor owners of any of its stock; that it was organized, if at all, by those original purchasers; and its stock at first appears to have been entirely theirs, rather than belonging to others in some considerable amount at that time. That it thus converted the apparent sale of the quarry for \$53,000 to others, merely into a real sale to themselves alone, at first in a corporate capacity, by themselves in an individual capacity, and in this way they charged other stockholders, who should afterward buy in, the enormous difference between that sum and the seven or eight thousand dollars only, which was the original cost of the whole and the improvements. That, beside some of this being not disclosed fully to Warner, so far as any evidence is put in, the president and secretary were not proprietors of the stock originally, nor acquainted intimately with its concerns, nor was the agent, Bates; and the former had been induced to officiate in their stations under flattering assurances which all failed, and for stock chiefly given to them for services, and which peculiar situation of theirs tended directly to mislead those confiding in their general respectability and judgment, as members and purchasers of stock in the ordinary manner. That instead of a large amount of

capital having ever been paid in with money, as was represented, the treasurer swears he never received in that way over one hundred dollars; and, from the exhibits in the case, not over a thousand was probably at any time so paid, an important fact, unknown to Warner, for aught which appears, and contrary to the distinct averments in Fales' answer. That the original proprietors of the quarry, as members of the company, or creditors of it, were still interested in all the stock, except two hundred and thirty shares, out of two thousand of the old emission, and two hundred and forty out of eight thousand of the new emission, instead of the new owners being numerous, and to a large amount, as Warner probably supposed; that inquires of officers, who owned nothing, or only a few shares given to them for their services, and knew little about the company, were not likely to be very useful, but rather to mislead, as their information must have been chiefly obtained from parties deeply interested to make sales; that the geologist who reported on the quarry, did so before it had been much opened or worked, and had been induced by Fales to leave out the important facts of there being much more granite in the immediate neighborhood of this; and that every owner of the stock, and especially the original purchasers of the quarry, among whom was Fales, had a strong motive and interest, to the extent in all of near \$50,000, in getting new owners of shares.

It is further manifest that Daniels' representation of a number of persons in Newport having bought into the company, and which he admits he made, and which was calculated to have much influence on a purchaser, was unfounded. It is not supported by any proof; and the statements by him and Fales as to the company being duly organized, which goes to the essence of the validity of the shares, and of the purchase of the quarry, and is denied in the bill, do not appear to be sustained from the records—the evidence proper for that purpose in an issue like this—though they are by the oath of one of its officers, who aided to organize it. All this evidence on record, if existing, is in possession of the respondents, and is the best and suitable evidence of such a fact: *Denning v. Roome*, 6 Wend. 651, 656; *Owings v. Speed*, 5 Wheat. 420. It is also the suitable evidence to prove not only the organi-

zation, but the authority to buy the quarry, and execute the notes, issue the shares, and other material proceedings of the corporation: *Rea v. Mothersell*, 1 Strange, 93. This, and not the incompetency of the owners of the quarry to pass a title to a corporation, if duly organized and composed chiefly or only of themselves as members, is the ground on which this part of the case is very defective, and leads to a strong presumption that radical objections exist to the regularity of the proceedings of the company in these important matters. It is charged in the bill that the company was fictitious, and hence this point becomes material. But I should hesitate to decide the case on this objection alone, as the error may be one that could be removed by further evidence, and may have happened from an impression that it was the duty of the complainant to put in the record, or that the oath of the clerk was sufficient evidence to show the original organization, and the charter and acts done under it, as may suffice under different issues, and when the question is an incidental one: 3 Met. 133; *Ibid.* 282; 7 *Ibid.* 592.

But finally, it is manifest further that several misrepresentations, very material and calculated to mislead Warner, were made by both of the respondents. Thus, the statements which are admitted to have been made by both Daniels and Fales, of the successful operations then going on, viz., on the 19th of November, 1836, under the agent, Bates, and of the valuable contract which had been made, and was fulfilling at Portsmouth, and which were calculated to be very influential with Warner, or any other purchaser, and to be much relied on by them, as it was testing by experiment what was before theoretical as to the goodness and value of the quarry, were utterly unfounded, and known to be so to Fales, if not to Daniels. These were assurances not only relied on, probably, but were material, distinct, not vague, and such as were proper to be relied on: *Trower v. Newcome*, 3 Mer. 704; *Scott v. Hanson*, 1 Sim. 13.

They were the most important representations next to the legal existence or continuance of the company itself, which could be made, and by Fales' own letter of October 5th, to the agent at Durham, as well as by the agent's testimony, they were, not only then, on the 19th of November, known to be

false by Fales, but Fales, as early as the 5th of October, urged the agent to keep the truth concealed from the public lest it might injure the value of the property. On this account Warner had not the means of detecting the groundlessness of those misrepresentations.

The agent left Durham entirely about the 1st of November, and went to New York for the company, and he left their employment the last of November.

Daniels joined with Fales, or was principal, in all these last unfounded assertions, calculated to deceive Warner in most important particulars. He had opportunities to know, and must be presumed to know, if this be necessary to charge him, that some of them were entirely groundless, and especially that one made by him alone, concerning a large number of persons at Newport having bought into the company.

These, then, vitiate the transaction as representations untrue on material points, and if untrue by mistake, still vitiating as much by such a mistake in material matters as if there was a fraudulent design: *Daniel v. Mitchell*, 1 Story, 172. So it is the better opinion, that whether Daniels himself knew these accounts to be false or not is immaterial, if they were false and influential: 1 Story's Eq. Jur., § 193; *Ainslie v. Medlycott*, 9 Ves. 13, 21; *Graves v. White*, Freeman. 57; *Pearson v. Morgan*, 2 Bro. Ch. C. 388; *Shackleford v. Hadley*, 1 A. K. Marsh. 500.

So if Daniels himself had not made some of these false representations, but was present when Fales made them, and was benefited by them, it vitiates the transaction: *McMeekin v. Edmonds*, 1 Hill's Ch. R. 288, 293; 1 Grant's Ch. 267. He adopts the contract, and these were a part of it—some of the *res gestæ*. He can not take part and repudiate part, when the other contractor acts on the whole. The Portsmouth contract with the government, which Daniels admits he stated to Warner in exhibiting the extent of their business and prospects on November 19th, had also been obliged to be abandoned or transferred at a loss of five hundred dollars, as early as October, from the unfitness of the stone to fulfill it. But this last fact seems to have been entirely concealed or suppressed, and *suppressio veri* is as bad as *suggestio falsi*,

and it here related to a particular highly important in respect to the prospective value of the shares and the quarry. It was a fact, likewise, more within his own knowledge, and which it was his duty to disclose: Story on Eq. Jur., §§ 149 and 197; 2 Kent. C. 484.

The agent employed, Colonel Bates, whose character is admitted to have been high, and to command any business in which he was engaged, was spoken of to Warner, and his high salary, as an evidence of the extent of their business, but the important facts were suppressed, not only that he had reported against the goodness of the quarry, but their inability, on that account, to fulfill the Portsmouth contract, and their failure to supply him his own salary, or with means for working the quarry further. So Dr. Jackson's report was printed and distributed, and a copy delivered to Warner, but the fact concealed that Fales had requested him to strike out what was said of other granite quarries near. These were extensive, and that fact, if known, would of course tend to diminish the value of theirs. It is difficult, also, to see why Daniels should be so anxious to sell more of his stock to Whiting, as well as pay Warner only in this stock, as he represented it was at par value in Boston, if the quarry was likely to yield a dividend in the spring of seven per cent., if it was the best stock in the market, or if it was worth dollar for dollar, all of which considerations he urged on Whiting in November, 1836, when Warner was present.

His declarations about a week after, in trying to sell a note to Whiting, against the company, were of a like character, and hardly to be explained on any honest hypothesis; for he averred that the company "would cash a demand against them at any time"; when, if true, why was he so anxious to sell the note? And why had Bates, the agent, been obliged to stop work in part for want of funds? And why had not the five hundred dollars been paid for the loss on the Portsmouth contract? And why had not the numerous other debts, and especially the original, been paid? And if true, how were the means obtained, when only from one hundred or one thousand dollars, to the utmost, had ever been paid in by the stockholders?

This last talk with Whiting is competent evidence (*Brad-*

ley v. Chase, 22 Maine, 511) being on a subject of a kindred character, near the time of the transaction in question, and illustrating his intention: *Wood v. United States*, 16 Peters, 342, 360; 14 Id. 430; 1 Starkie on Ev. 64; 2 Ibid. 220; 1 Phillips on Ev. 179; Cow. Ed.; 2 Ibid. 452, 463; 4 Bos. & Pull. 92; 7 Bingham, 543.

The entire worthlessness of the shares soon became apparent to those officers who had been duped, as well as to several others. The whole estate, including the quarry, which had been mortgaged, was foreclosed, and went merely to pay the balance of the small amount of the original purchase money. The tools, stone, etc., remaining, were attached to secure other debts; and the original purchasers of the quarry, having most of the stock of their corporation left on their own hands, became bankrupts like Fales. Instead of \$40,000 having been paid in on the shares, as Daniels alleges, the only receipts in money satisfactorily proved were only from a hundred to a thousand dollars—but a drop in the bucket to their expenses; and the company thus, for aught which appears, ceased to have legal existence or credit or property, and exploded, as one of the worst among the thousand bubbles in the speculating mania of that period.

Often an entire failure of consideration in the receipt of what is mere moonshine, is sufficient to rescind a contract: *Terry v. Breck*, 1 Grant Ch. 367; *Chesterfield v. Janssen*, 2 Ves. Sen. 125; *Dyer v. Rich*, 1 Met. 180, 192. It shocks the conscience on the face of the transaction, and is sometimes plenary evidence of fraud. But mere inadequacy of consideration may honestly occur, and often raises no certain presumption of deceit: 1 Story Eq. Jur. § 244, 245, 246; as the difference may be small, or if large, occurring from other causes than fraud; and more especially is this the case in speculating times like those of 1836. *Blackford v. Christian*, 1 Knapp P. C. 73, 77; 1 Brown, Ch. C. App. 558, 560. It is not *per se*, fraud: *Griffith v. Spratley*, 1 Cox, 383; *Lov v. Barchard*, 8 Ves. 133; 3 Ves. & B. 180. To charge such a loss on an innocent purchaser of its shares, rather than on its projectors and early owners, would seem inequitable if the contract had not been carried into effect; but even after that, if it turns out to have been carried into effect by fraudulent

representations and falsehoods, on points very material (*Smith v. Richards*, 13 Pet. 26, 37), it would be derogatory to courts of equity and justice, if they could not, and did not lend relief: *Attwood v. Small*, 6 Clark & Finn. 232; 2 Ridg. P. Cas. 397; *Jackson v. Ashton*, 11 Pet. 229; *Osgood v. Franklin*, 2 John. Ch. R. 1, 23; *White v. Damon*, 7 Ves. 30; 18 Ibid. 535.

The points here, where misrepresentation occurred, were manifestly material, as they should be, to present a ground for our interference: *Phillips v. Duke of Bucks*, 1 Vern. 227. Nor is this a case of clear and sufficient redress at law. The aid of a court of chancery was indispensable to obtain the discovery of most of the important facts in the case; and hence an application for relief here can well be sustained on, and in connection with that discovery, notwithstanding the 16th section of the judiciary act of the United States, requiring us to refuse aid in chancery when it can be obtained as fully at law.

I do not find it necessary to consider several other matters pressed at the hearing, or if not pressed, disclosed in the pleadings and evidence. These, to which I have referred, rest on facts admitted, or clearly proved for the complainant, and not disproved on the part of the respondents by proper evidence. These also give the case a direction that seems to accord with the broad face of the whole transaction. They will work no injustice to any one, as the result will be merely to place the parties in *statu quo*, as they stood before November 19, A. D. 1836.

The only remaining objection is the length of time that has since elapsed. But it appears that steps have been taken to obtain this relief, since 1840.

That the complainant was induced to believe for some years that the revulsions in the times were the cause of the works not going on; that till about 1840 he was not aware he possessed a remedy in chancery, and that the shares and the farm have not been affected by the delay since, so as to render a rescinding of the contract either impracticable or inconvenient. The value of neither appears to have materially changed since, which, when happening, sometimes constitutes an objection: 5 Mason, 244; 8 Cranch, 471; 8 Clark & Finn. 650.

Length of time unexplained may sometimes be a bar short of the Statute of Limitations, but if fraud exists, or the delay is accounted for, it is no bar: See 2 Scho. & Lefr. 629; 17 Ves. 99; 7 Johns. Ch. R. 90; Angell on Limitations; *Hough v. Richardson*, before referred to, and *Vigers v. Pike*, 8 Clark & Finn. 562; *Sanborn v. Stetson*, 2 Story, 481-488; 1 Howard, 192. So it will not be a bar by analogy to the statute, as to length of time, if such a course would work injustice: 1 Story Eq. Jur., § 64a; 1 John. Ch. R. 316; 2 Ves. Jur. 571; 1 Atk. 493; 10 Ves. 466, 467; 12 Ibid. 268, 374; 1 Ibid. 374; 14 Ibid. 91; Cooper Ch. C. 204; 20 Johns. R. 58, etc.

If either party can not restore the property in good condition, that may be a good ground for not rescinding, but at the same time damages can be and should be given instead of rescinding, if necessary to enforce what is just and the case is properly in chancery.

Thus, if the inability to restore happens by the course of the complainant, it should not prejudice him in getting some kind of relief, if he was not then aware of the fraud: 3 Littell, 365. But if damages alone are sought, and alone can be given, and the fraud related to personal property, the relief is usually at law: *Russell v. Clark*, 7 Cranch, 84. Though some cases hold otherwise, even there: *Evans v. Bicknell*, 6 Ves. 182; *Bacon v. Bronson*, 7 John. Ch. R., 194, 201; 1 Story Eq. Jur. § 184, etc. But it could not be held otherwise in the United States courts, under the clause in the judiciary act before referred to, if the remedy at law be complete, since then it is provided resort shall be had to law rather than equity.

In cases of fraud in the sale of real estate as here, when a court of equity can set aside the sale and a court of law can not, the jurisdiction of the former is usually held to be clear: 1 Bibb Pr. 244; 1 Story Eq. Jur. § 184, *et seq.*; 2 Ibid. §§ 798, 799 *et seq.*; *Hepburn v. Dunlop*, 1 Wheat. 197. So, the jurisdiction in equity is clear, where a discovery is sought as here: *Gaines v. Chew*, 2 How. 619. In relation to the sale in this case, then, let it be rescinded, and the shares conveyed by Warner to Daniels, and the farm by Daniels to Warner, and a master be appointed to report the amount of rents and waste (after deducting permanent improvements) that, in the

meantime should be allowed to Warner by Daniels: 1 Bibb, 244; *Daniel v. Mitchell*, 1 Story, 172, 179.

It appears, I think, from the printed case, that when it was made up, Daniels still owned, and was in a situation to reconvey the farm, and that Warner, though the shares stood in his son's name as owner, still probably could control and reconvey them. Should such still be the case, it can be closed as just directed, without any complexity or resort to any estimate of damages, on the master's reporting. But if the condition of either party should be materially altered in this respect, it will be proper to provide for it, if the power and right to do so exist in this court. Some cases hold that if either party, pending the proceedings, sells the property so that he can not reconvey, damages alone should be given, though not in other cases: *Todd v. Gee*, 17 Ves. 273; *Denton v. Stewart*, 1 Cox, 258. But some authorities hold that in all cases where the jurisdiction in equity has once attached clearly to the case, damages alone may be given, whenever reasonable, and may be estimated either by a master in chancery, or on an issue *quantum damnificatus* to a jury. See cases cited in 2 Story, Eq. Jur. §§ 794-799; 9 Cranch, 493; 1 Peere Wms. 570; 4 Ves. 497; 3 Atk. 512.

If, contrary to expectation then, neither the land nor the shares can be reconveyed, the master can hereafter examine and report the damages done to Warner by the misrepresentation of Daniels and Fales, and a decree be entered against them for the amount. If the farm can be reconveyed, and not the shares, the former can be done and the net income ascertained and paid as before directed; the value of the shares, if anything, in December, 1836, and interest since, being reported by a master, and deducted therefrom. In rescinding a contract it seems reasonable to adopt a rule like that in enforcing a specific performance, which is, to go as far as you can, *pro tanto*, and give proportionate damages for the residue: 2 Story Eq. Jur. § 779; 1 McLean, 62; *McKay v. Carrington*, 1 Fonb. Eq. B. I. ch. 1 § 8; 1 Wheat. 197; *Paton v. Rogers*, 1 Ves. & B. 351. Should the facts, therefore, require more than what has first been proposed by mutual reconveyances, I am prepared to go further according to what seems to me to be sound principle, sustained by several precedents, in addition to what has already been cited.

The parties in this case come here for discovery and relief, and have obtained the former, when it could not be had in a court of law; and, in order to make the redress perfect, if third persons have since become interested in the property, so that the fraudulent sale can not be set aside, and a reconveyance made of the whole, the relief for damages becomes necessary and proper, either in part or in full. A court of equity may relieve as to part of land or contract, if the fraud does not reach the whole. It will go to the extent of the injury: *Dunlap v. Stetson*, 4 Mason, 349, 364. Thus in *Pratt v. Law*, 9 Cranch, 494, in a bill in equity, where a contract has been partly performed, and the rest, that is, other lots, can not be conveyed specifically, because sold, etc., the court can make an issue *quantum damnificatus*, and decree the amount, or, without it, make the party pay the ratio of the price given for all, which the deficiency of lots bears to all. So in *Woodcock v. Bennet*, 1 Cow. 711, in a prayer for a specific performance, it was held that the court may refer it to a master to assess the damages, and not dismiss the bill, because they can not enforce a specific performance, the land having been conveyed away: 1 Foub. Eq. 38, in y, and 165, in b; 3 Atk. 512-517; 1 P. Wms. 570: *Colt v. Nettervill*, 2 Ibid. 304; *Denton v. Stewart*, 1 Cox, 258; *Greenaway v. Adams*, 12 Ves. 401.

The bill, then, must be dismissed as to E. Fales and Scott, and a final decree entered against Joseph Fales and Daniels, on the principles above set out, and with costs.

CORNELIUS V. MOLLOY.

(7 Pennsylvania State, 293. Supreme Court, 1847.)

¹ **Composition metal sold for copper.** A sold to B a quantity of metal as copper, which A knew to be not copper, but a composition metal. A is liable for the deceit in concealing his knowledge from B, who purchased on the representations of A and was thereby deceived.

Test of declaration, after verdict. A declaration is good after verdict which shows a good cause of action, though defectively stated; otherwise, if it show no cause of action though correct in form.

¹ *Carondelet Works v. Moore*, 2 M. R. 625.

Inspection, where defect is latent. The fact that an article sold was inspected by the purchaser will not avoid the liability of the vendor when it is a different thing from that which the purchaser intended to buy and its true character could not be ascertained by mere inspection.

Concealment of knowledge that the article sold was not in fact what it appeared to be, or of such circumstances as would induce a purchaser to test the article before buying, is an undue concealment for which the seller is liable in case for the deceit. (Per KENNEDY and BELL, JJ.)

Certificate from the Nisi Prius.

Jan. 17, 18. This was an action on the case to recover damages for a fraud in selling a composition metal as copper. The first count averred that the plaintiffs, at the instance of the defendant, bargained for a quantity of copper at a certain price; that defendant intending to defraud the plaintiffs, fraudulently delivered to them as copper, so bargained for, a certain composition metal, whereas, in truth, the metal so delivered was not copper, and this the defendant knew; and so the defendant defrauded the plaintiffs in such sale, whereby they lost the benefit of such sale. The second count averred the bargain for copper for so much as it was worth, and that defendant knowing said copper not to be copper, so agreed to be bought, but composition metal, sold and delivered it as copper, and thereby deceived and defrauded the plaintiffs.

On the trial before KENNEDY, J., it appeared that the agent for the plaintiffs called on the defendant and inquired if he had any old copper to sell; he said he had. They looked at it in the storehouse, and the agent thinking it to be good copper from its appearance, went to consult the plaintiffs, after learning the price was eighteen cents per pound. On his return he agreed to take it. It was then weighed, the bill signed by the agent, and the goods delivered at the factory, stored and paid for. Two days after, wanting some copper, the agent took some of this, but on heating and striking it, it was found not to be copper, and unsuited for the purposes of the plaintiffs. Notice was then given to the defendant, but he declined to receive it back, saying he had bought it for good copper. It was also shown that shortly before this occurrence, the defendant had sold part of the same goods to a gas-fitter who returned it as not being copper and received other copper in exchange. The metal was, in fact, French sheathing

copper, sold at auction on account of underwriters. At the auction where the defendant purchased there was a question made, whether it was composition, but the captain of the vessel said they knew no other article than copper, and it must be sold as such to avoid difficulties with the underwriters, and it was sold as copper without any warranty, and with the caution that buyers were to depend on their own inspection. The actual value was twelve and a half cents per pound, but the auction price was seventeen cents.

The defendant proved that the plaintiff's agent was present during the weighing, which took an hour and a half, and had every opportunity to inspect it. His son said that when the agent came to buy it, the defendant said, "There it is; judge for yourself; I sell it as I bought it." He further gave evidence that the article was a new one in the market, and known as French copper. That in France from whence it came, it was known as copper; all compounds of that metal being there known by that name. There was some other evidence that the article when in sheets was known in the market as sheathing copper, and a good deal that it was not copper, but an alloy of various metals.

His honor in his general charge coupled with his answers to the points submitted, none of which required it to be left to the jury as a question of fact whether the article was merchantable under the name of copper, told the jury in substance that supposing the defendant had said "judge for yourself," yet if he used it with the intention of being thereby freed from responsibility while he was knowingly practicing a deceit, it was a fraud. It was for the jury to inquire as to his intention; whether he induced the purchase knowing it was not copper. On this point his honor referred to the matters which had occurred at the auction, and the subsequent sale and return of the goods, adding, the captain's statement gave no character to the article; it was not known in this market, and had acquired no commercial name; and it being a new article, the rule that if ordinary diligence might have discovered the defect, the seller would not be answerable, did not apply. If, then, he had reason to believe it was not copper, was he not bound to tell the purchaser his reason for such belief? If he designedly omitted this to induce the purchaser to buy,

and it was material for them to know, and if known, it would have prevented the purchaser's buying. the withholding of the information amounted to a fraud—if not a suggestion of falsehood, at least a suppression of truth for which he was answerable.

That the *narr.* was insufficient, and the charge calculated to mislead the jury, with six particular exceptions to the charge, were assigned for error.

FALLON & TODD, for plaintiffs in error

J. P. MONTGOMERY and D. P. BROWN, *contra.*

Feb. 5, BELL, J.

The defendant invokes the aid of the common law rule, which, departing from the pure morality enforced by the civil code, ordains that a vendor is not to be held answerable for the quality of his wares or for any latent defect in them, unless he has made a fraudulent representation or practiced some trick or artifice in respect to them whereby the vendee was deceived. It is very true that generally speaking a mere omission by a seller to communicate his knowledge of such defects will not bind him to answer for them, though under peculiar circumstances, even silence will be deemed a fraud. Notwithstanding some contrariety of opinion is to be discovered in the cases springing from a disposition sometimes entertained to ingraft upon the body of the common law the doctrine of the civil law, it is now established as the general rule that the foundation of such an action as the present is the fraud and deceit of the defendant, by active artifice, to the injury of the plaintiff; or as has been well expressed by an eminent judge, it is the fraud and damage coupled together, which entitles the party injured to relief in a court of justice: *Bacon v. Bronson*, 7 Johns. Ch. R. 201. Such frauds exist where a party intentionally misrepresents a material fact, or willfully produces a false impression, in order to mislead another or to obtain an undue advantage of him; and this misrepresentation may be as well by arts or artifices, calculated to delude as by positive assertions: 1 Story's Eq. S. 192; *Laidlaw v. Organ*, 2 Wheat. 195; 1 Dow. Parl. R. 272. Ordinarily this rule does not comprehend the expression of a

false opinion when the parties are dealing irrespective of the particular knowledge possessed by each because, as it is said, the simulated opinion is presumed not to mislead the other party, who has equal means of information, or at least can not be supposed to rely upon it. But if the seller falsely represent the quality or character of the commodity to be other than it is in fact, he will be liable to an action for deceit, or may be defeated in a suit brought for the purchase money, if it appear that the purchaser, not enjoying equal means of knowledge, trusted to such representation. These principles are recognized by many cases. Among them may be mentioned the *Oneida Manufacturing Society v. Lawrence*, 4 Cow. 440, where it was held that if the purchaser has a full opportunity to examine the article the vendor will not be answerable for any latent defect, unless there be fraud or express warranty, or such a direct representation as is tantamount to it. This is in accordance with *Daves v. King*, 1 Stark. Rep. 61; (2 E. C. L. R. 302), and *Baglehole v. Walters*, 3 Camp. 154, which decide that, where a deceit is practiced for the purpose of putting the party off his guard and preventing him from being as watchful as otherwise he would have been, an action for the deceit may be maintained. This is especially so where the thing sold is affirmed by the vendor to be in specie, the thing bargained for, when in truth it is something in its nature essentially different; and it will matter nothing that the article has been inspected and received by the buyer, if its true character be not easily ascertainable by such means, short of analytical experiment, as only indolence or folly would omit. This doctrine is asserted in *Osgood v. Lewis*, 2 Harris and Gill, 495, on a question of breach of contract in the sale of summer strained oil for winter sperm oil, the difference between which in ordinary weather, could not be discovered upon inspection. The principle of this case is thought to be departed from in the subsequent determination by the same court, of *Hyatt v. Boyle*, 5 Gill & Johns. 119; but however this may be, it is certainly in accordance with our own case of *Borrekins v. Bevan*, 3 Rawle, 23, afterward recognized in *Jennings v. Gratz*, as settling the rule in Pennsylvania that a seller is answerable where the article inspected and received by the buyer fails to correspond in specie with the thing as which it

was sold. To the same effect, and indeed going further, is *Shepherd v. Kain*, 5 Barn. and Ald. 240, where a ship was advertised for sale as a "copper fastened vessel," but "to be taken with all faults, without allowance for any defect whatsoever." The vessel, though partially copper fastened, was not what is known in the trade as a copper fastened vessel. The buyer had a full opportunity to examine her before the sale; yet in an action on the warranty it was ruled he was entitled to damages for that the words, "with all faults" could only mean all faults to which a copper fastened vessel may be subject; but here the vessel was not copper fastened, as she was described to be. Most of these, it is true, were actions *ex contractu* arising from a breach of warranty express or implied. But the principle they announce is a *fortiori* applicable in case, as for a deceit which proceeds upon the ground of direct falsehood and fraud in the defendant whereby the plaintiff was misled and damnified. "A seller," says Mr. Justice STORY, in his luminous treatise on Equity Jurisprudence, "is unquestionably liable to an action of deceit if he fraudulently represent the quality of the thing sold to be other than it is in some particulars which the buyer has not equal means with himself of knowing; or if he do so in such a manner as to induce the buyer to forbear making the inquiries which for his own security and advantage he would otherwise have made." This proposition is also advanced in substance by Chancellor Kent in his Commentaries, Vol. 2, 484, 485, 2d Ed., and an examination will show it to be the result of all the cases.

If we apply these principles to the facts proved on the trial of this cause, little or no hesitancy can be felt in coming to the conclusion that the instructions given to the jury at *nisi prius* were, in every essential particular, correct.

So far as appears from the record, the case was put upon the concession that the article sold by the defendant to the plaintiff was not copper, but a metal used as a substitute for it in sheathing ships. Though portions of it may have been copper, yet, as the testimony established, adulteration by the admixture of foreign ingredients had been so extensive as to destroy any distinctive character it might have originally possessed. Subjected to the test pointed out in *Jennings v.*

Gratz, there would seem to be no pretense for asserting it to be copper in any sense, since it certainly was not merchantable under that designation. But upon this point and for the purpose of this decision, it is sufficient to repeat that the idea of its being entitled to the appellation of copper does not appear to have been entertained at the trial. The points submitted by the defendant for the answer of the learned judge who presided, do not assume it to have been so entitled; nor was he ever asked to leave to the jury as matter of disputed fact, what was the true character of the article in question. The charge proceeds upon the concession that the thing sold was not copper, and though on the argument the defendant's counsel complain that the judge took the fact from the jury, it is not assigned for error here that he did so. We are then bound to treat the case as it appears to have been treated below, and in this aspect of it the first question is, did the defendant make any representation to the plaintiff's agent in reference to the character of the subject proposed to be bought and sold? This admits of but one answer. *McGinley* swears that when he called on the defendant he asked if he had any old copper for sale. To which the defendant replied he had 4,000 pounds, or a little over, and immediately carried the agent to the store where the so-called copper was deposited, and exhibited it as such. To the same effect is the testimony of *William Molloy*, the defendant's son. Here, then, was a direct affirmation made in the course of the negotiation, of a distinctive character of the article offered.

The next question is, did the defendant know at the time, that this affirmation was false, and did he fraudulently advance it to mislead the plaintiff's agent and induce him to buy? This was a question of fact for the jury upon all the evidence, which I may say in passing, appears to have been abundantly sufficient to establish a *scienter* and fraudulent motive—and was so, fairly, left to them. But in addition to positive misrepresentation, I think with the judge who tried it, the case presents an instance of undue concealment of material facts for which a court of equity would grant relief, and affording sufficient foundation for an action in a court of law. I agree that one dealing with another is not, under our system of law, bound in every instance to disclose all the facts

within his knowledge which may be material to the interests of that other. But there are cases where a party is under a legal, or least, an equitable obligation to communicate what is not known to the other party. In these cases, it is said, the latter has a right to be informed not merely *in foro conscientiae* but *juris et de jure*. This is always so where, from the nature of the subject, there is created a trust or confidence between them, which authorizes the ignorant party to act upon the presumption that there is no concealment. A familiar illustration of this rule most commonly cited by text writers, is of one selling an estate knowing he had no title to it, or knowing that there are incumbrances on it, of which the vendee is ignorant. The suppression of such a material fact in respect to which the vendor must know the very purchase implies a trust and confidence that no such defect exists, would avoid the sale on the ground of fraud: *Arnot v. Biscoe*, 1 Ves. Sr. 95, 96. Another instance is furnished by *Pearson v. Morgan*, 2 Bro. Ch. R. 390, where a party when applied to for information by another about to loan money on the faith of a certain sum supposed to be secured upon an estate misrepresented the fact and concealed the truth. Mr. Justice BULLER, in giving judgment said: "In cases where fraud is a question of fact, it is always considered as a constructive fraud, where the party knows the truth and conceals it, and such constructive fraud always makes the party liable." But these observations are to be taken in connection with the fact that information was specially applied for. In the case in hand, from the impossibility of discovering by inspection, the true character of the article offered, the vendor must have felt the vendee acted upon a confidence inspired by the acts of the former that the thing was what it seemed to be. But besides here was an application for information answered by misrepresentation, and studied concealment to assist it, and the case is thus brought, as it seems to me, within the principle of *Pearson v. Morgan*. Nor does it help the defendant, that subject to the suggestion of falsehood and the suppression of truth, as found by the jury, he said to the plaintiffs' agent, "there it is; judge for yourself, I sell it as I bought it;" if the latter was put off his guard by the original misrepresentation and the expressions were used in the vain expectation

of escaping the responsibility already incurred. Such an artifice will not suffice to cancel the obligation incumbent upon a vendor to speak the truth, if he speak at all.

The last inquiry in cases of this nature is, was the vendee misled by the misrepresentation and concealment? In this instance, the evidence leaves little, if any room for a doubt upon this head. But, this, too, was a question for the jury, and was so left to them by the court. By their verdict they have returned an affirmative answer.

This general review of facts, and of the principles which must direct the decision of the cause, disproves the existence of any mistake in the charge of the court. A detailed examination of the several errors assigned in this court, is therefore unnecessary, and they are dismissed with the single observation, that they suggest nothing to warrant our interference with this judgment.

The ninth error avers that the plaintiffs' *narr.* is insufficient to support the verdict and judgment.

This objection was very faintly urged on the argument, and is untenable. The declaration sets out a good cause of action; it may be, defectively, but this is cured by the verdict. The difference is between a bad title to action, correctly pleaded, and a sufficient title insufficiently averred.

Judgment affirmed.

WOOD V. THE MARQUIS OF LONDONDERRY.

(10 Beavan. 465. The Rolls Court, 1847.)

Collusion with lessee to forfeit and renew. Lands were subject to a lease of way-leave—the privilege of carrying the product of certain colleries across them, which lease it was in the power of the lessee to surrender on notice. While it was outstanding for a long term, the land and the rental of this lease were sold to separate parties. After some time the owner of the land and the lessees entered into an arrangement to put an end to the lease and accept a new one. *Held*, that this was contrary to equity, and that the purchase of the rental of the old lease should be compensated in full out of the rental reserved in the new one.

By articles of agreement, dated in 1823, John Hutton agreed to grant to the Marquis of Londonderry a way-leave from his

collieries over the Wardenlaw and Deanhouse farms, for a term of sixty-three years, from May day, 1823, at a rent of £400 a year, and £3 an acre to the tenants of the estate for the ground damage in making the road. And "the lessee was to be at liberty to give up at the end of any year of the term, on giving twelve months notice."

The property was copyhold, held under the see of Durham, and license to demise could not be obtained for a longer period than twenty-one years.

The road called the Seaham Railway, was accordingly made over this and other property, but no lease had been granted at the death of Hutton.

In 1828 Hutton died, and a suit being afterward instituted for the administration of his estate, a lease was granted to the Marquis of Londonderry under the direction of the court, for the term of twenty-one years from the 13th of May, 1823; and the lease contained a power to the lessee of surrendering his lease at the end of any one year of the term upon giving twelve months notice in writing to the persons entitled to the rents of the lands over which the way-leave extended. The lease recited the agreement for a lease for sixty-three years, and though it contained no covenant for renewal at the end of twenty-one years, so as to complete the sixty-three years, yet there appeared to have been no waiver of the right.

Hutton's property was sold by auction in the suit. Lot 11, consisting of the Wardenlaw farm, was purchased by the defendant Gregson: and as to this lot, the particulars of sale stated as follows: "The purchaser of this lot is to take the same subject to, and will be entitled to the benefit of the reservations and covenants contained in the lease of the Seaham Railway so far as the same relates to the property comprised in this lot, or to the tenants or occupiers thereof; *but the vendors reserve for sale, by separate lot, the rent reserved for way-leave by the said lease.*"

Lot 12 was purchased by the plaintiff, and was described as follows: "Lot 12. The annual sum of £182, part of the yearly rent of £400, paid by the Marquis of Londonderry for way-leave, for the produce of his collieries, over the Wardenlaw farm, lot 11, and part of the Deanhouse farm, lot 7, and secured by a lease granted to him in 1832, for a term of

twenty-one years, commencing the 13th day of May, 1823. The lessee has a power of determining the lease at the end of any year of the term, on giving twelve months' notice; and in the said lease is contained a recital of an agreement for two further terms of twenty-one years each, making the full term of sixty-three years."

At the end of the conditions of sale there was a note or statement as follows: "The leases of the way-leaves referred to in the foregoing particulars will be produced, and may be inspected, at the time of sale."

The Wardenlaw farm was conveyed to the defendant Gregson, and the £182 a year was assigned to the plaintiff for the residue of the term of twenty-one years granted by the lease, "and also during the said two further terms of twenty-one years mentioned in the same lease, so as to make up the full term of sixty-three years contracted for by the articles of agreement," and the assignment was made subject to the power of the marquis to determine the lease.

The lease for twenty-one years expired on the 13th of May, 1844, and Gregson obtained a license to demise to the Marquis of Londonderry for a further term of twenty-one years. On the 23d of May, 1844, he entered into an agreement with the Marquis of Londonderry for granting "a renewed lease of way-leave" over the Wardenlaw farm for sixty-three years, for all coals and other mineral produce, by whomsoever and out of whatsoever collieries wrought, and also for colliery and harbor materials, and for goods, merchandise and general traffic, including passengers. The certain rent was fixed at £252 per annum for the privilege of leading 250,000 chaldrons of coals (53 cwt. each), and a tentale rent, after the same rate, was to be paid for all coals led exceeding such annual quantity; colliery and harbor materials, goods, merchandise and general traffic to go rent free. The lessee was to have liberty to terminate the lease at the end of the tenth or any subsequent year of the term on giving twelve months' notice.

The existing agreement, dated 8th May, 1823, entered into by Hutton for granting a way-leave to the said marquis over the land above mentioned, and other lands, for a term of sixty-three years from May-day, 1823, at a certain rent of £400 for the whole distance, was to be terminated either by surrender

or notice. "The lessor was to take upon himself and to hold the lessee harmless against the claims of the parties entitled by purchase from the trustees of or otherwise under Hutton, to the rent made payable by the said agreement of the 8th May, 1823."

After this agreement Gregson refused to pay Wood any portion of the rent reserved for the way-leave, on the ground that this was a new agreement, and not a continuance of the old one, which had been put an end to. After a considerable correspondence, the plaintiff, on the 9th of April 1846, filed his bill, insisting on his right to a continuation of the payment to him of the £182 out of the rent now received from the Marquis of Londonderry, and praying a declaration of his right to the annual sum of £182 for the remainder of the sixty-three years, or so long as the marquis should use the way-leave over the property or until it should be given up and duly determined according to the terms of the agreement of 1823, and for consequential relief.

After the filing of the bill and on the 25th of April the solicitor of the Marquis of Londonderry gave notice to the plaintiff that the marquis had entered into a new agreement with Mr. Gregson, dated the 23d of May, 1844, whereby that of 1823 had been superseded; and though advised that it was unnecessary to give him notice, yet, by way of precaution, he did give notice that such agreement had determined, and that if it could not be determined without notice to him, then he thereby gave notice that the same should determine at the earliest period thereafter that the marquis could determine the same.

The cause now came on for hearing.

Mr. TURNER and Mr. TOLLER for the plaintiff, contended that the new arrangements entered into after the expiration of the lease, were but a scheme and contrivance to deprive the plaintiff of the benefit of his purchase and to transfer the £182 from the plaintiff, who had paid for it, to the defendant, who had bought subject to it.

That the surrender was merely pretended and colorable, for the road had never been given up by the Marquis of Londonderry, who continued to hold it under the original agreement

of 1823. And as to the notice, that it was sufficient, and not given until after the institution of this suit.

That Gregson having purchased, with full notice of the plaintiff's rights, and expressly subject to them, could not, in equity, exercise his power over the estate in such a manner as to defeat the plaintiff's right to the rent of £182 a year, and acquire it himself; for if he had such a right at the expiration of the lease, he would have the same right the day after the plaintiff had paid £1,200 for the purchase of the rent of £182. That this would be manifestly contrary to every principle of equity, as the defendant had, in consequence of the reservation of the rent of £182, given so much the less for the estate.

That the plaintiff had, therefore, an equity to have his rent of £182 satisfied out of the rent now payable by the Marquis of Londonderry for the way-leave.

Mr. ROUPELL and Mr. FABER, *contra*, for the defendant Gregson. The plaintiff can attach no equity upon the benefits reserved by the agreement of 1844.

He bought expressly subject to the right of the lessee to surrender the lease and without any covenant or obligation on the part of Gregson to renew it for his benefit. He was entitled to the £182 so long only as the Marquis of Londonderry enjoyed the way-leave under the agreement of 1823. That has been put an end to, and the road is now held under a different agreement varying in its terms from that of 1823, and not limiting the leave to coal. Again, there is no privity of contract between the plaintiff and Gregson.

By the particulars of sale, the vendors reserved only "the rent reserved for way-leave by the said lease;" therefore, at the expiration of the lease the reservation expired.

Mr. KINDERSLEY and Mr. C. HALL, for the Marquis of Londonderry, took no part in the discussion.

Mr. TURNER, in reply.

Giddings v. Giddings, 3 Russ. 241; *Lufkin v. Nunn*, 11 Ves. 170; *Doe dem. Potter v. Archer*, 1 Bos. & Pul. 531; *Randall v. Russell*, 3 Mer. 190; *Hardman v. Johnson*, 3 Mer. 347, were cited.

THE MASTER OF THE ROLLS.

It seems to be quite certain that Mr. Gregson, with his eyes open to all the difficulties of the case, and with the determination of defeating, if possible, any interest which the plaintiff may have, has adopted this course of proceeding at all risks, and with clear warning of the consequences.

The only question is, whether he has a right to defeat the plaintiff's rights, for his own purpose, in the way he has attempted. Notwithstanding the nature of the agreement of 1823, it seems to me, having regard to the situation of the parties, to the mode in which the property was disposed of, to the way in which they became entitled to it, and to the events that afterward took place, that this ought to be considered as a subsisting right for the whole length of time comprised in that agreement; and, if that be so, then the question is, whether one party having certain lands and rights is so to deal with the Marquis of Londonderry as to defeat entirely the right of the other.

That the defendant intended to do it if he could, is too clear. He meant to take advantage of his position if he could, to oust Mr. Wood from any right he had, and to procure that benefit for himself.

How then did the matter stand on the expiration of the lease? There was not the least obligation on the part of the lord of the manor to grant the licenses on which the renewal of the leases altogether depended. There was not the least obligation on the part of the Marquis of Londonderry not to put an end to the lease. So that the interests of the plaintiff were subject to be entirely defeated by a lawful act or the lawful exercise of power both of the Bishop of Durham and the Marquis of Londonderry; but, subject to these conditions, these parties were connected in the way that has been stated. Then, the defendant seeking for his own profit at the expense of the plaintiff and notwithstanding the conditions of his own purchase, attempts to defeat the agreement of 1823 by entering into an agreement for that very purpose.

I think that he had no right to do so.

I can not go the length of saying that the agreement could

not be put an end to without carrying into effect the provision that the ground should be restored to the original state, for that was a covenant entered into by the lessee for the benefit of the land owner who might have waived it if he had thought fit.

Here, the defendant Gregson, availing himself of his position with the marquis and of his situation as owner of the land, put an end to the first agreement entirely for his own benefit, and enters into this new agreement immediately after. He took his chance, and my opinion is, that he has not been successful, and that he is not entitled to maintain the new agreement exclusively for his own benefit. He has attempted, contrary to equity and good conscience, to abuse his power as purchaser of the land in order to defeat the right of the plaintiff in respect of the same land, in a manner that this court can not allow.

There must be a decree for the plaintiff with costs. The words in which the declaration is to be framed require some consideration.¹

¹ ABSTRACT OF DECREE.

Declare plaintiff's right to the £182, did not determine on the expiration of the term of twenty-one years, granted by the lease of 1823; but that on the expiration thereof, the plaintiff continued to be and is entitled to the said annual sum during such term (not exceeding sixty-three years from 1823) as the Marquis of Londonderry has and shall hold the said way-leave under the agreement of 1844.

Direct payment accordingly, with costs.

ALLEN V. GILREATH.

(6 Iredell Eq. 252. Supreme Court of North Carolina, 1849.)

¹ **Definite, against vague entry—Extraordinary survey lines.** A made an entry "running so as to include the rock quarry," a well known site, but the entry was otherwise so vague as to be void for want of description. Afterward B made an entry with definite description, including the quarry. A, with full notice of B's entry, caused a survey to be made a few yards in width and 180 rods in length, so as to reach the quarry, and upon such survey obtained a grant: *Held*, that under these circumstances A is to be looked upon as a junior enterer with notice of a prior entry by B; that the title of B was preferable, and that A should be decreed to make conveyance and to account.

¹ *Johnston v. Shelton*, 4 M. R. 308.

Location of claim after negotiations conceding title to it. Before the entry of B he had agreed to purchase from A a tract of land, *A reserving the rock quarry*; but the rock quarry did not, in fact, exist on any part of the tract: *Held*, that this formed no reason in equity why A should not enter the rock quarry when he found it vacant.

Cause removed from the Court of Equity of Henderson County, at spring term, 1849.

On the 17th of January, 1838, the plaintiff made an entry of vacant land, "lying on the north side of Clear creek, in Buncombe county, adjoining the lands of Edmonson, the said George Allen and Edward Shipman, and running so as to include the rock quarry," and afterward had a survey and obtained a grant for nineteen acres, including the quarry, dated December 20, 1838. On the 19th day of November, 1838, the defendant obtained a grant for 95 acres and 79 poles, purporting to be issued on an entry made January 7, 1831, and surveyed on the 10th of November, 1838, which includes the land granted as above, to the plaintiff. The bill states that a few days after the plaintiff made his entry, he informed the defendant that he had made it and that it included the quarry, and that the defendant had full knowledge that the plaintiff had caused his survey to be made and it included the rock quarry, which was a notorious place, well known to the defendant and the people of the neighborhood generally; the bill further states, that before that time the defendant had claimed the said rock quarry, under a conveyance made to him of a tract of land by one Edward Shipman, which was supposed to include it; and the plaintiff discovered that the same was not within the lines of the land granted to Shipman and by him sold to the defendant, and then he made his entry and communicated it to the defendant, as before mentioned; and that, thereupon, and with a view to defeat the plaintiff of his entry, and after the plaintiff's survey, the defendant had an entry which he had made in 1831, for 150 acres, of which the beginning corner was in the mountains at the distance of two miles from the quarry, and which was vague in its terms, so surveyed as to include the quarry and the other land granted to the plaintiff, and that in order to do so, the defendant was obliged to pass directly through four tracts of granted land and to make his tract 180 poles in length, while for nearly

the whole length, it is only a few yards wide; the bill charges that in truth, the defendant had no intention at the time he made his entry, to include therein any of the land granted to the plaintiff or any of the intermediate granted land, and that when he found the conveyance from Shipman did not cover the quarry, he had it surveyed in the form he did, for the sole purpose of defeating the plaintiff's special entry and survey; the bill further states that the defendant had brought an action of trespass against the plaintiff for taking stone from the quarry and had recovered therein. The prayer is that the defendant may be declared a trustee for the plaintiff, as to so much of the land as was entered by and granted to the plaintiff, and be decreed to convey the same to him and to repay the damages and costs recovered from plaintiff, and to come to an account for profits otherwise made by him.

The answer states that on the 25th of October, 1831, Shipman conveyed to the defendant a tract of land containing 265 acres by metes and bounds, which the parties believed covered the quarry, which is the subject of dispute; and that, on the 22d of November, 1834, the defendant contracted to sell the same land to the plaintiff (reserving the quarry) at the price of \$400, in annual installments of \$100, and to convey the same in fee upon the payment of the purchase money, of which the last instalment fell due December 25, 1839, and that they entered into written articles to that effect, in which the defendant obliged himself to convey the said land by the description specified in the deed of Shipman to him, expressly however, "excepting and reserving to himself and his heirs and assigns, ten acres out of said land lying on the southwest part of said tract, including the rock quarry in the center of a square, with the right of way through said land to pass to and from the said quarry." The deed from Shipman and the articles with the plaintiff are exhibited, and agree with the statements of their contents in the answer. The answer admits that the plaintiff informed the defendant in February, 1838, that the plaintiff had ascertained by a survey that the Shipman deed did not include the quarry, and that he had entered it; and it states that the defendant did not know whether it was in fact vacant or included in the Shipman tract, and that he determined with the intention of protecting

his own rights, and out of abundant caution to guard against a fraud on himself by the plaintiff in defeating his claim to the quarry, thus agreed to be reserved, to have the quarry included in a survey and grant upon an entry he had made in 1831, which might be made to extend to it, as it called for the waters of Clear creek and the lines of Shipman; and that accordingly he did so. The answer states that when he made his entry of 1831, the defendant "had no correct idea of the lines of the many tracts of land lying or supposed to lie adjoining or nearly so, or of the other tracts in the vicinity; and of course that he could not have intended it to cover any particular quantity or parcel," and the defendant insists that the plaintiff can not call in question the right of the State to grant her land in any form or of the defendant to make his survey upon the elder entry made in good faith, so as to take in any and all small pieces of vacant land that might be found between the lines of the other tracts. The answer further states that after both grants were issued, that is to say, on the 1st day of July, 1839, the plaintiff accepted a deed from the defendant for the land sold to him, describing it according to the lines and corners in Shipman's deed, and expressly excepting and reserving the ten acres including the rock quarry in the same terms in which that reservation was made in the articles and so it appears by the deed, which is filed as an exhibit. And the answer insists it was a fraud on the part of the plaintiff to make an entry of the land, which it had been thus agreed between the parties, should belong to the defendant; and that by reason thereof the plaintiff ought not to have the assistance of the court.

BAXTER, for the plaintiff.

N. W. WOODFIN, GAITHER and EDNEY, for the defendant.

RUFFIN, C. J.

So far as the rights of the parties depend merely upon their entries and grants, and without reference to any contract or other equity between them, the plaintiff seems to be clearly entitled to the relief he seeks. The defendant has not filed a copy of his entry, and from the omission and the inferences

from the answer, it must be understood to be a vague one, not specifying the land entered by the defendant, or that granted to him. Indeed, it is clear the defendant did not intend to embrace the disputed land in his entry; for, upon being informed that the plaintiff had entered the quarry, he said to a witness that the entry should do him no good, as he had an entry on the mountain, which he could run down so as to include the quarry; and upon being reminded that there was granted land between his entry and the quarry, he replied that made no difference, as he could pay the State for granted land, if he chose, without hurting his title to that which was vacant. Moreover, the contract between those parties shows that the defendant could have had no motive to include in his entry the rock quarry, as he then thought it his under his purchase from Simpson. It is established by the proofs, that the defendant claimed the quarry under that purchase, and not under an entry of his own, down to the time in 1838, when he was informed that the plaintiff had discovered it was vacant and entered it. The case, then, is, that the plaintiff entered the land without any knowledge of the defendant's entry, and without the defendant's having an entry in fact which did cover it specifically, or which was designed by him to cover it; and that, with full knowledge of the special entry of the plaintiff, he perverted a previous vague entry of his own, by having it, contrary to his original intention, so run as to include the land entered by the plaintiff, with the express view to defeat him; and that the plaintiff went on afterward in due time to survey his entry, pay the purchase money and get a grant, without even a knowledge on his part, as far as appears, that the defendant had made any such entry or survey or obtained a grant, until after the grant to the plaintiff had issued. Clearly, upon these facts the plaintiff would be entitled to a conveyance from defendant; for, by reason of the vagueness of his entry, the defendant stands in the same situation as a junior enterer, with notice of the prior entry of the plaintiff, and the right of the plaintiff is the preferable one. *Plemmons v. Fore*, 2 Ire. Eq. 312; *Johnston v. Shelton*, 4 Ire. Eq. 85.

But the defendant insists that he had a right thus to intercept the plaintiff, because the plaintiff knew the defendant

claimed the quarry, and in the contract between them, that and ten acres of land were reserved to the defendant, so as to make it a fraud in the plaintiff to get the land by entering it himself. But whether it be a fraud or not, depends upon the obligations imposed on the plaintiff by the contract, and no equity is perceived to have been raised by it to restrain the plaintiff of the liberty, in common with other citizens, of entering this land. The reservation of it in the articles makes it evident that the parties thought it was included in the conveyance to the defendant. But in fact it was not, and was vacant, and so was the subject of entry by any one. A person of a delicate sense of propriety, situated as the plaintiff was, might not have thought himself at liberty to make an entry, but have rather thought it a duty of kindness and honor to advise the defendant that the land was vacant, so as to let him have the opportunity of entering it. But a similar obligation rests upon every man who finds out that a person is living on or improving vacant land, under a belief that it is his own. Yet such land is subject to entry by any one, as well as by the occupant, and the court can not restrain the right, notwithstanding the hardships, unless there be something peculiar in the relation of the parties binding in conscience on the one to take care of the interests of the other. There does not seem to be anything here to establish a fiduciary relation between the parties. It was, indeed, their contract that the plaintiff should not have the quarry under his purchase from the defendant, but it was no part of it that the plaintiff should assure to the defendant his supposed title to the land reserved or thought to be reserved, or that the plaintiff should not purchase it from any other person to whom it might belong. If the plaintiff had not purchased from the State, any one else might; and the plaintiff by his contract with the defendant neither acquired access to any peculiar means of information, nor obliged himself to refrain from availing himself of any he might first gain, as to the title of the land, which was alike open to the defendant and to all the world. Therefore there is no ground for saying that the plaintiff took an undue advantage of the defendant, which might not be said with equal truth of any one who should have entered the land with a knowledge that the de-

fendant claimed it, and, though mistaken, believed it to be his own. It can not be declared, therefore, that the defendant's fraud, in endeavoring to defeat the plaintiff of his entry, was justified or excused by its necessity in order to counteract a fraud projected by the plaintiff against the defendant; and the plaintiff must have the decree he asks for, a conveyance and account. The plaintiff is not only entitled to receive back the sum he paid for damages in the action at law, but also the costs adjudged to Gilreath, the plaintiff in that action. The present plaintiff's own costs at law, if any, he must submit to lose, as he had no legal defense, and it was his folly not to apply at once for relief in equity: *Keaton v. Cobb*, 1 Dev. Equ. 439.

Decreed accordingly.

PER CURIAM.

MCDOWELL ET AL. V. SIMMS ET AL.

(6 Iredell's Eq., 278. Supreme Court of North Carolina, 1849.)

Mere praise of property is no fraud. Mere statements of the great value of premises as gold property are not fraudulent representations.

By-bidder—No laches allowed in favor of rescission. Conceding the employment of a by-bidder at an auction sale to be a fraud, yet the vendee can not set it up as ground of rescission unless he abandon forthwith; he can not first prospect the property and then come in to set the sale aside.

Appeal from an interlocutory order made at the Spring Term, 1849, of Rutherford Court of Equity, his Honor, Judge BAILEY, presiding.

The bill states that a certain tract of land lying in the county of Rutherford, and particularly described in the bill, belonged in fee to the defendants as tenants in common; that the said land was offered at public sale to the highest bidder, by the defendants, on the 20th day of May, 1845, when the plaintiffs were the last and highest bidders and became the purchasers, at the price of two thousand and eight dollars, for which the plaintiffs gave their bonds, according to the terms

¹ *Tuck v. Downing*, 7 M. R. —

of the sale—one due in twelve months for one thousand and four dollars, and another at two years for the same amount—that on each of these bonds suit was brought in the Rutherford Superior Court of Law, and on the first judgment was rendered against the plaintiffs at the Fall term of the said court in 1847, and that the suit on the other bond is still pending, and the defendants threaten to take out execution on the said judgment and to prosecute the other suit to judgment and force the collection of it also by execution. The bill further states, that when they gave the said bonds they received a bond from the defendants to make a title to the said land, but that as yet no deed of conveyance has been actually made. The bill further sets forth, that the said tract of land is worth but little, probably not more than four or five hundred dollars, for agricultural purposes or indeed for any purpose, unless gold mines could be found on its surface or in its bosom; that when it was advertised to be sold as above set forth, it was advertised, not as a farm, but as a valuable gold mine; and it was so represented repeatedly by the said heirs, and one Thomas Jefferson and others, who, as the plaintiffs understood and believe, were procured by them to do so, with a view to puff the property and cheat the purchaser, both before and on the day of sale; that one of the defendants often urged one of the plaintiffs to attend the sale, and assured him that it was worth ten thousand dollars, but that he was not able to purchase it, or else he would do so at any price, and assured the said plaintiff that a large proportion of the low grounds, many acres, would yield two or more pennyweights of gold to the hand per day. The bill further states, that on the day of sale, when the plaintiffs purchased the said land, the said heirs, or some of them, and the said Thomas Jefferson, agent for others, were present and employed divers persons to puff the said lands as containing a valuable deposit gold mine, and among others, one Preston Long, who was the son-in-law of one of the defendants, and resided in the immediate neighborhood of the land, and who professed to be well acquainted with the land, as no doubt he was, and who represented it as being very valuable for the purpose of mining for gold.

The bill further charges that the said Preston Long was secretly employed by the defendants or their agents in con-

ducting the sale, and with the knowledge and consent of the defendants, not only to puff the said land but also as a by-bidder to run the land up greatly beyond its value; that the said Long did accordingly bid and run the land up, and these plaintiffs were the more induced to bid on account of Long's connection with the family, and well-known acquaintance with the land. The bill further states, that the plaintiffs were entirely unacquainted with the land, and were induced to purchase solely from the false representations of the defendants and their agents, and from the bidding of the said Long.

The bill further states, that the land is utterly worthless for mining, and that after employing hands for several months the plaintiffs have been unable to find gold enough to defray the expense, and that they have requested the defendants to rescind the contract, which they have refused to do. The prayer is that the contract may be rescinded and in the meantime for an injunction.

The answer admits that Long was employed as a by-bidder, but avers that it was done solely for the purpose of preventing a sacrifice of the land, and not with any fraudulent intent; and it denies that the defendants made any false or fraudulent representations about the value of the land, either on the day of sale or at any other time.

Upon the coming in of the answer, the injunction, which had been granted, was dissolved, and the plaintiffs by leave appealed.

N. W. WOODFIN and IREDELL, for the plaintiffs.

AVERY and GUYON, for the defendants.

PEARSON, J.

We concur in opinion with the judge below, and think, upon the answers, which are to be taken as true in this stage of the proceedings, the injunction ought to have been dissolved. The general allegation of fraud, by a false representation of the value of the land as a gold mine, and by a combination among the defendants by such representations to defraud the plaintiff, is positively denied by the answers,

fairly and without evasion. It was the ordinary case of a vendor's praising the property offered for sale. "A splendid article, a valuable gold mine worth not less than ten thousand dollars," are words used by vendors or persons offering to sell, and understood by purchasers or persons wishing to buy to be unmeaning and pass for what they are worth.

The specific fraud is that one Long, at the instance of the defendants who offered the land for sale, bid for the land, and run it up to the price of \$1,950, with an understanding between him and the defendant that if the lands fell upon his hands at the bid, it should be no sale, but the title was to be with the defendants; whereas the terms of the sale were that the land should be sold to the highest and best bidder, and no right was reserved or notice given that Long was bidding for the vendors. Whether his by-bidding vitiates the sale so as to give the plaintiffs an equity upon that ground alone to repudiate the contract, is a question about which the authorities do not agree. Lord MANSFIELD in *Bexwell v. Christie*, Cowper's Rep. 395, and Lord KENYON, *Howard v. Castle*, 6 Term Rep. 642, held, that such by-bidding does vitiate the sale, and that the purchaser is at liberty without more saying, to refuse to abide by his contract or purchase. On the other hand Lord ROSSLYN and Sir WM. GRANT have each questioned the soundness of the doctrine: *Coudly v. Parsons*, 3 Vesey, 625; *Smith v. Clarke*, 12 Vesey, 477. They hold that by-bidding, when it is not done for the purpose of inflating but merely to prevent a sacrifice of the property, furnishes no ground, of itself, to vitiate a sale. We are inclined to the opinion of Lords MANSFIELD and KENYON. If persons wish to reserve a right to buy in, unless the property sells for more than a given sum, good faith requires that bidders should have notice; and a secret bidding with this view would seem to be a fraud, where the terms of sale are to the highest and best bidder; and it is impossible, as Lord ROSSLYN and Sir WM. GRANT attempted to do, to run a dividing line, so as to say when this by-bidding is intended for puffing, and when merely to prevent property being sold at a sacrifice. In the nature of things any by-bid tends to inflate the price, more or less, except it be announced to be a bid for the owners of the land. We are not called upon in this case to decide the question definitely, for, be it

either way, it is certain that a purchaser who wishes to avail himself of such an objection, must do so as soon as the fact comes to his knowledge, and can not go on to test the mine; so that, if it turns out not to be rich, he falls back upon the objection that there was a by-bidder. There must be good faith on both sides, and the purchaser as soon as he discovers that there has been by-bidding must make his election. The bill does not allege when the plaintiffs discovered that Long was a by-bidder. It may be that they knew it at the time of the sale or soon afterward, before they gave their bonds. At all events there is no allegation that they did not know it before they went on to explore and test the mine fully; and their wish to repudiate the contract, as the case is now presented to us, would seem to be, because upon examination there was not as much gold to be found as they hoped for, and not because, by reason of the by-bidding of Long, they had been surprised and induced to give more than they otherwise would. This pretext of a by-bidding has now the appearance of being set up as a ground for getting clear of a bargain, which may be a bad one, whereas, if the gold mine had proved to be valuable it never would have been heard of.

There is no error in the interlocutory order appealed from. This opinion will be certified to the court below.

Ordered to be certified accordingly.

PER CURIAM.

BECK V. KANTOROWICZ.
KANTOROWICZ V. CARTER.
KALB V. KANTOROWICZ.

(8 Kay & Johnson, 230. High Court of Chancery, 1857.)

¹ Secret payment by vendor to one of the purchasers—Breach of trust—Mine worth the full price. Four out of five persons who entered into a provisional contract to purchase a mine, which they agreed to sell for their joint benefit to a company, were deceived by the fifth, who, assuring them that the vendors would not take less than £85,714, ob-

¹ *Vigers v. Pike*, 8 Clark & F. 562; *Page v. Parker*, 40 N. H. 47; 43 Id. 363; 6 M. R. 544.

tained secretly from the latter an agreement that if the contract were perfected, and money paid, he should receive thereout a bonus of £20,000 for his pains in effecting the sale. Two of the four having absolute powers from the rest to sell to the intended company, then formed themselves with others into a committee of management, and still ignorant of the surreptitious agreement issued a prospectus, stating that a contract had been entered into for the purchase by the company of the entire property for £125,000, "including all preliminary expenses, and a premium to the parties who incurred the risk and responsibility of the original purchase." The company having been established, the requisite capital paid up and the provisional contract perfected: *Held*, that the £20,000 transaction was fraudulent and void, not only as against the four original purchasers, but also as against the company, notwithstanding the mine proved cheap at the price (£125,000) at which they became shareholders. It was not enough that the company got the whole of their bargain. They had a right to the best bargain which the two members of the committee of management, had they known the facts, would have been in a position, acting fairly and rightly, to give them.

Early in the year 1853, the defendant Kantorowicz entered into a negotiation with the defendants Carter, Moriarty, Twynham and Werninck, with a view to a purchase by himself and them of the mining concession, "Wildberg," in Germany, then the property of the widows Hunsdiecker and Merttens and Leopold Hunsdiecker, for which, he represented to his co-defendants, that the proprietors would not consent to take less than 1,000,000 florins Rhenish (£85,714.)

By a contract in German, dated the 15th of June, 1853, and made between the widows Hunsdiecker and Merttens and Leopold Hunsdiecker, of the one part, and the defendants, Carter Moriarty, Twynham, Werninck and Kantorowicz of the other part, reciting that the parties of the first part were sole, exclusive and irrevocable proprietors of the concession; that the parties of the second part wished to purchase the concession, should the same after examination answer their expectations, such purchase to be for a society or company which they intended to form among themselves or with other parties, or exclusively for other parties; and that the parties of the first part were willing to transfer their property for 1,000,000 florins, Rhenish. In order to give the parties of the second part liberty to become acquainted with the peculiarities of the mine, and in order to form the company in

whose interest they intended to purchase, but, at the same time, in order to indemnify the parties of the first part in the event of the non-completion of the contract, it was stipulated (*inter alia*), 1st, that the parties of the second part having paid to the parties of the first part \$100,000 (£15,000), in consideration of that payment the right was thereby conceded to the parties of the second part to purchase the said concession as their property and forever, within six months from that day, by simple declaration of acceptance before the notary drawing up that instrument, either on their own behalf or on behalf of that person or society which they might name, for 1,000,000 florins Rhenish (\$571,428); 2d, that if any acceptance should take place within the six months, the \$100,000 should become the irrevocable property of the sellers and serve as first instalment of the purchase money, the remaining \$471,428 to be paid on or before the 15th of January, 1854, of which payment the purchasers should have the right to hand over \$143,000 in paid up shares at the nominal value of the stock of the company purchasing the mine, should such company be formed; 3d, that from the day of acceptance, the purchasers should enter upon the real possession of the object of sale in such manner as if they had possessed and used the same from that date; 4th, that up to such time of acceptance the parties of the first part should remain in possession, work the mines and hold the clear produce in trust for the eventual proprietor; and 5th, that, if the declaration of acceptance should not have been made within the six months, the parties of the first part should be authorized, without previous summons and by the mere expiration of the term, to dispose of their property, and should acquire out of the \$100,000 the amount of \$50,000 as indemnity for the non-completion of the negotiation, the remaining \$50,000 to be paid to the account of the defendant Carter.

On the same 15th of June, 1853, and previously to the execution of the last mentioned contract, an indenture of even date was executed by Carter of the first part, Twynam of the second part, Moriarty of the third part, Kantorowicz of the fourth part, Werninck of the fifth part, and the defendant Harris of the sixth part, in reference to the deposit of the 100,000 dollars (£15,000), whereby, after reciting that the

parties of the first five parts had agreed to purchase the premises, and the conditions for the payments of the deposit of £15,000 and for the forfeiture of a moiety of that sum by the last mentioned parties in the event of their not completing the purchase; and reciting that the deposit had been contributed in the proportions following, viz.: Carter £3,000; Twynam £6,000; the plaintiff Beck, £3,000; and a Mr. Vallance, £3,000, making together the sum of £15,000; and further reciting the contract of purchase, of even date, then about to be executed, it was agreed, that, in the event of the contract not being carried out, the forfeiture of a moiety of the deposit should be borne equally by the parties of the first five parts, and the same indenture contained a covenant by Harris, in the event of Kantorowicz or Werninck failing to perform their part of the agreement, to pay to the parties of the first three parts such sum as might be found to be the proportions payable by Kantorowicz and Werninck, or either of them, in respect of the forfeiture.

By a letter of the same 15th of June, and by an indenture of the 20th of July following, Kantorowicz and Werninck agreed to pay to Harris £1,000 and interest; and that their one-fifth shares in the mine, or in the beneficial interest in the contract should be charged with payment of that sum, and also by way of indemnity to Harris in respect of his having entered into the guarantee on behalf of Kantorowicz and Werninck.

On the same 15th of June, 1853, after the execution of the contract and indenture of that date, articles of agreement or partnership, of even date, were made between Carter, of the first part; Twynam, of the second part; Moriarty, of the third part; Kantorowicz, of the fourth part; and Werninck, of the fifth part; whereby, after reciting the contract for purchase, it was declared and agreed, 1st, that the contract for purchase had been entered into by the said parties thereto for their mutual benefit, and that they were and should be jointly interested in the profit or loss arising therefrom, in equal shares and proportions; 2d, that the said contract had been entered into on the distinct understanding and agreement that any three of the parties thereto, of whom the defendants Carter or Twynam should be one, should have full and absolute

power and authority to negotiate and deal with the said mine and property in as full and ample a manner, to all intents and purposes, as if all the parties thereto joined and concurred personally in any act so to be done by any three of the said parties, provided that either Carter or Twynam should be one of such three parties; and 3d, each of the said parties thereto expressly and fully authorized and empowered any three of the others, of whom Carter or Twynam should be one, to take all necessary steps, and to do and enter into any act, deed, matter, agreement or arrangement respecting such contract of purchase and the property comprised therein, and to do all and every act and acts in reference to the completion or non-completion of the said purchase, and relating or incidental thereto, as any three of the said parties thereto, of whom Carter or Twynam should be one, should in their full and absolute discretion think right.

After the execution of the several documents of the 15th of June, 1853, the mine was examined; and, the result proving satisfactory, it was determined to complete the purchase and to form a company.

Accordingly, in November, 1853, a prospectus was issued, entitled "The Prospectus of the Wildberg Great Consolidated Mining Company, to be conducted (until a royal charter for a Societe Anonyme be obtained) under the Prussian mining law." And stating, in large letters at the top, that the capital of the company was 1,000,000 dollars, or £150,000, in 75,000 shares of £2 each. It then stated that the committee of management consisted of five persons, viz.: the defendants, Carter and Twynam, and the plaintiffs, Beck, Morris and Underwood; and that the company was established for the purpose of working the mine at Wildberg. Then, after describing the value of the mine as tested by a recent careful investigation, the prospectus contained the following passage: "A contract has been entered into for the purchase by the company of the entire property, for the sum of £125,000, including all preliminary expenses, and a premium to the parties who incurred the risk and responsibility of the original purchase. To this sum £25,000 have been added for working capital. It is believed, however, that £15,000 will be amply sufficient for that purpose, and the remaining £10,000 will be reserved, and

only raised if a larger expenditure in the machinery, etc., than is now contemplated should hereafter be found expedient, with a view to increased profit from the mines; and, in that case, the shares will either be issued to the existing shareholders or sold for the benefit of the company. The purchase includes also the whole of the ores raised since the 15th of June, 1853. The vendors have agreed to receive the purchase money as follows, viz.: £55,000 in cash, and £70,000 in paid up shares, £50,000 of which shares will not be transferable until after the expiration of six months from the day of allotment." The prospectus concluded with a description of the character of the mine, and setting forth numerous reports representing it as a very valuable and profitable investment.

The company was established by a notarial act, on the 13th December, 1853; the requisite shares were allotted, and the requisite capital was paid up.

A declaration of acceptance of the original purchase was given on the 13th of December, 1853; and, on the 15th of January, 1854, the balance of the purchase money was paid to the original proprietors, as to part in cash, and as to the remainder by a *promesse d'actions* (share certificate) for 10,725 paid up shares in the company, of the nominal value of 143,000 dollars (£21,450).

Shortly afterward it was discovered that, under a contract made on the 20th of January, 1854, between the widows Hunsdiecker and Merttens and Leopold Hunsdiecker, and the defendant Kantorowicz, the *promesse d'actions* had been notarily deposited with a notary at Cologne, to be held in trust, as to 665 only of the shares, for the widows Hunsdiecker and Merttens and Leopold Hunsdiecker; and, as to the remaining 10,060 shares, of the value of 134,134 dollars, or upwards of £20,000, in trust for Kantorowicz, with a declaration that the parties were interested in the *promesse d'actions* in the above proportions. In this contract of the 20th of January, 1854, reference was made to a contract made on the 7th and 23d of October, 1853, between the attorneys of the widows Hunsdiecker and Merttens and Leopold Hunsdiecker, on the one part, and Kantorowicz, on the other part, whereby, "in consideration of the great pains which Kantorowicz had taken to bring the business" (meaning the contract for purchase of the

15th of June, 1853) "to a favorable issue," the said attorneys bound themselves, in the names of their principals, in case the purchase contemplated by Messrs. Carter and others should be completed and the purchase money paid within the time limited, to pay Kantorowicz that portion of the purchase money which should exceed 425,000 thalers, deducting, however, out of such portion, interest from the 15th of June at £5 per cent., and all expenses incurred by the proprietors, with power for the proprietors, in case a portion of the purchase money should be paid in shares of such a company as Messrs. Carter and others contemplated establishing, to transfer the same amount of shares at their nominal value to Kantorowicz, in payment of the amount to be received by him. And the contract contained a proviso that, in case Messrs. Carter and others should fail to make the declaration of acceptance within the time limited, or to pay the purchase money at the stipulated period, Kantorowicz should have no claim whatever for his trouble.

On discovering what had passed between Kantorowicz and the former proprietors, the defendants, Carter, Twynam, Moriarty and Werninck, at once repudiated the transaction, and they and the plaintiffs instituted a suit in Prussia against Kantorowicz, to recover the *promesse d'actions*. A cross action, for the like purpose, was also commenced in the same courts by the defendant Kalb, to whom Kantorowicz, for valuable considerations, had assigned his interest in the *promesse d'actions*.

Under these circumstances, the defendants, Carter and Twynam, as members of the committee of management, retained in their hands a sum of £302 3s. 9d. and the certificates for 2,425 shares, which together represented the fifth part to which Kantorowicz was entitled in the premium then payable to the five defendants for the purpose of reimbursing themselves and the plaintiffs the costs and damages sustained by them in respect of the proceedings in the Prussian courts.

In November, 1854, Kantorowicz, for valuable consideration, assigned the 2,425 shares, and the £302 3s. 9d., to Harris in trust (subject to the indenture of the 20th of July, 1853) for the defendant Kalb.

The plaintiffs, Beck, Morris and Underwood, as three of the

committee of management of the company, now filed their bill on behalf of themselves and all other of the shareholders of the company, except such of the defendants as were shareholders, against Kantorowicz, Carter, Twynam, Harris, Moriarty, Werninck and Kalb, praying 1st, that it might be declared that the appropriation for the benefit of Kantorowicz of the *promesse d'actions* was, to the extent at least of 10,060 shares, part of the 10,725 shares therein comprised, a fraud upon the plaintiffs and the other shareholders in the company; and that Kantorowicz was answerable for, and that he might be decreed to make good to the plaintiffs and the defendants Carter and Twynam, as the committee of management of the company, on behalf of themselves and the other shareholders in the company, the said 10,060 shares; 2d, that the certificates of the 2,425 shares, and the £802 3s. 9d. retained by Carter and Twynam, might be applied in discharge of the aforesaid liability of Kantorowicz, and of the value of the 10,060 shares and toward re-imbursing the plaintiffs and the defendants Carter and Twynam the costs incurred by them in the Prussian courts; and also all costs and expenses incurred by them in this suit and in the two suits of *Kantorowicz v. Carter and Kalb v. Kantorowicz*, which had been instituted respectively in August, 1854 and May, 1855, in this court, to recover the certificates for the 2,425 shares and the £802 3s. 9d., retained by the defendants Carter and Twynam.

It appeared by the evidence that throughout the negotiations with the original proprietors for the purchase of the concession, and until after the declaration of complete acceptance, the defendants, Carter, Moriarty, Twynam and Werninck, looked upon Kantorowicz as a joint purchaser with themselves, and that both before and after the contract of June, 1853, they availed themselves of this knowledge and information—he being better informed than themselves as to the value of the property—and pressed him to get better terms than those proposed (1,000,000 florins); that he repeatedly stated that the vendors would not sell for less than that price, that it was in vain to ask them; and that it was desirable for them to complete the purchase, because there was a French party in the field, who was desirous of making the purchase, if they did not. These representations were repeated by Kantorowicz in October, 1853.

The court was also satisfied upon the evidence that in fixing £125,000 as the price to be paid by the company for the concession, the committee of management believed they were to pay the whole 1,000,000 florins (£85,714) to the original proprietors; and intended to provide, and believed they were providing, a sum not exceeding £30,000, as the premium to be paid to the parties who incurred the risk and responsibility of the original purchase.

Mr. ROLT, Q. C., Mr. DANIEL, Q. C., and Mr. BEALES, for the plaintiffs, contended that the surreptitious contract entered into by Kantorowicz with the original proprietors of the mine, and the appropriation by that defendant of the *promesse d'actions*, was a fraud, not only upon the defendants Carter, Moriarty, Twynam and Werninck, who had joined with him in the purchase, in the belief that he had a common interest with them in obtaining the property as cheaply as possible, but also upon the company at large, who, through their agents, Carter and Twynam, had been equally defrauded, and compelled to pay for the mines a sum exceeding by more £20,000 the price which the latter, as members of the committee of management, would otherwise have fixed for the purchase of the mine, including the preliminary expenses and the premium mentioned in the prospectus.

Upon the first point, they cited *Hichens v. Congreve*, 1 Russ. & My. 150; and *Fawcett v. Whitehouse*, Id. 132.

Mr. LOCOCK WEBB, for the defendants Carter, Twynam and Moriarty; and Mr. E. C. CLARKSON, for the defendant Werninck, waived their claims to the shares in question in favor of the company.

Mr. WILLCOCK, Q. C., and Mr. ELDETON, for the defendants Kantorowicz and Kalb, contended that in the original negotiation for the purchase of the mine, Kantorowicz was a seller, not a buyer. *Hichens v. Congreve* was the clearest case of fraud imaginable. There the parties were in a fiduciary relation, and *Foss v. Harbottle*, 2 Hare, 461, showed that this, in Vice Chancellor Wigram's view, was the ground of that decision. Here there was nothing fiduciary in the case. It was not as their agent that his co-defendants put confidence in Kantorowicz.

The Vice Chancellor—If you can show that Kantorowicz had an interest in the mine, and came to sell that interest, of course the question is at an end. But the contract of June, 1853, under which he and his co-defendants claim the property, describes the Hunsdieckers and the widow Merttens as “the sole, exclusive and irrevocable proprietors.”

Mr. WILLCOCK, Q. C.—But, admitting that the transaction can not be maintained as against those who joined with Kantorowicz in that contract, it may still be valid as against the company. The defendants were not contractors for the company, but vendors to it. By their prospectus, they held out to the company that they might purchase for £125,000 a mine which has proved to be fully of that value. Every one who, after reading that prospectus, became a shareholder, purchased at that price. The mine can be worked at that price. Nothing is said in the prospectus as to the amount of the premium, and all that the plaintiffs complain of is simply this, that they have had to pay what they all agreed to pay for that which is well worth the money.

Mr. CAIRNS, Q. C., and Mr. TOULMIN, for the defendant Harris, were not called on, the Vice Chancellor deciding that inasmuch as the letter and indenture, under which that defendant claimed a lien, were anterior to the delivery of the *promesse d'actions* and any right that accrued from it, the court could not deprive him of the benefit of such letter and indenture.

Mr. DANIEL, Q. C., by the direction of the court, confined his reply to the question as between Kantorowicz and the company, the Vice Chancellor being clear that, as between that defendant and his co-purchasers, the transaction could not be maintained.

Judgment reserved.

Vice Chancellor Sir W. PAGE WOOD—The question in this case is whether the company, represented by the plaintiffs, is entitled as against the defendant Kantorowicz, or rather as against the defendant Kalb, as an assignee of a *promesse d'actions* given in Prussia—to have such *promesse d'actions* considered void as against the company, and to a lien upon cer-

tain other shares, and a sum of money, which two of the managing body of the company, the defendants Carter and Twynam, retained in their hands, and which would belong to Kantorowicz, if the transaction as to the *promesse d'actions* could be maintained, the plaintiffs contending that, if it can not be maintained as against the company, they are entitled to a lien on such last mentioned shares in respect of any damage they may sustain in consequence of the *promesse d'actions* having been given through the fraud, as they allege, of Kantorowicz, and in respect of any demand that may be made in respect of shares under the *promesse d'actions*. They also ask for an indemnity against the costs of certain proceedings in Prussia in respect to those shares.

The transaction, as between Kantorowicz and his four co-defendants, Carter, Twynam, Moriarty and Werninck, is free from all question of difficulty. Whatever may have been the position of their parties previously to the contract for the purchase of the mine, their position at the time of the contract is clearly indicated by the deed of June, 1853, wholly independent of any other evidence in the cause. That deed is very precise in its terms. It is between the Hunsdieckers and the widow Merttens, of the first part; and the defendants Carter, Moriarty, Twynam, Werninck and Kantorowicz, of the second part. The vendors are put in direct opposition to the vendees. Kantorowicz is not among the vendors, but is among the vendees. There is not the slightest notice of any interest of his in the property. On the contrary, there is that which excludes him from any interest in the property, namely, a distinct recital that the Hunsdieckers and the widow Merttens are the sole, exclusive and irrevocable proprietors of the mines. On the face of the deed it is clear, distinct and precise that the vendors are acting in respect of their interest on the one side, and that the five defendants, including Kantorowicz, are acting as purchasers on the other.

It is sworn positively by several of the witnesses, and it is not contradicted by Kantorowicz, that the four looked on Kantorowicz throughout as a co-purchaser with them, and their acts correspond with it. They also affirm, and of this I can have no doubt on the evidence, that anterior to the execution of the contract of June, 1853, which was in itself a de-

feasible contract, or more properly a contract which required perfecting by a complete acceptance within six months (although it was in one sense a contract, because it contained a clause of forfeiture of a sum of money if that acceptance was not declared), the four were in constant communication with Kantorowicz, and availed themselves of his knowledge and information, he being better informed about the property than any of the five, except perhaps Werninck; that they pressed him to get better terms than those proposed, viz., a million florins, and that he repeatedly stated to them, that the vendors would not sell for less than that price; that it was in vain to ask them, and that it was desirable to complete the purchase, because there was a French party in the field, who were desirous of making the purchase if they did not. And I can have no hesitation whatever in coming to the conclusion that all five were acting as purchasers, the four believing that Kantorowicz had a common interest with them in obtaining the property as cheaply as possible; that the four availed themselves, as far as they could, of his assistance in endeavoring to obtain those cheaper terms; and that he made the statement I have mentioned that the vendors would not make a reduction of the price, he being secretly in the position of a vendor, or intending to place himself in that position.

Whether he was then actually in the position of a vendor, or merely intended to place himself in that position, is immaterial. The deed which carries into effect the surreptitious arrangement between him and the vendors, is dated January, 1854, but it recites a previous contract of the 23d of October, 1853; and therefore, though it may be that there was no existing arrangement between the parties in June, 1853, when the deed was executed, it is plain there was such an arrangement in October and before the declaration of complete acceptance, which declaration of course, would never have been made by the four had the transaction with Kantorowicz been then disclosed to them.

By the deed of June, 1853, all the five agree to purchase of the vendors for 1,000,000 florins, or about £85,714 on a deposit of £15,009 with a clause of forfeiture of one half of that deposit, if complete acceptance were not declared within six months, which acceptance when made, was to operate, as the deed ex-

presses it as an actual conveyance, for it was to have the immediate effect of passing the interest to the purchasers. And in the interval, in October before the acceptance is finally declared, Kantorowicz is again pressed by the four to see if he can not reduce the purchase money, and repeats his representations as to the unwillingness of the vendors to reduce their price, and the improbability of a reduction. Under these circumstances, to permit Kantorowicz to say, as against his four co-purchasers, that by virtue of a secret agreement with those very vendors with whom he was treating he is to draw out of the purchase money this large sum of upwards of £20,000 would be contrary to every principle recognized either in this court, or in any other in which justice is administered; and this in fact has been the result, so far as the matter has at present proceeded, of the litigation that has taken place abroad.

Admitting then, as it must be taken to be admitted, and if not admitted, I have no hesitation in coming to the conclusion that, as between Kantorowicz and his four co-purchasers, the transaction in question can not for one moment stand; there arises the question, and that no doubt is one of more nicety, how far it can be considered to be a fraud upon the company.

As regards that question, the case is as peculiar as any to be found in the books. It stands thus: The original contract of the 15th of June, 1853, no doubt contemplated the formation of the company. It states, "such purchase to be for a society or company which they intended to form among themselves, or with other parties, or exclusively for other parties." The purchasers have therefore, a right to call for a conveyance, in any of those three channels, either to themselves alone, or to themselves jointly with others, or exclusively to others. Then they are to have six months to determine whether they will accept or not, from the day of acceptance they are to enter upon the real possession of the object of sale in such a manner as if they had possessed and used the same from that date; and if they do not accept there is to be a forfeiture of one half of the 100,000 dollars, the 100,000 dollars being in round numbers, £15,000 sterling.

It is important here to look at the other contracts entered into on the 15th of June, 1853. There were two other contracts entered into on that day, one anterior, the other poste-

rior, to the contract for sale. (His Honor stated the parties to, and the effect of the first of these contracts, and the covenant therein by Harris to indemnify the other parties in respect of the contribution of Kantorowicz and Werninck, and proceeded:)

In order to clear the matter with regard to Harris, I may say, that, after that, there is a letter of the same 15th of June, 1853, and an indenture of the 20th of July following, by which Kantorowicz and Werninck give him a lien on all their interest in the transaction, to the extent of a bonus of £1,000, and also by way of indemnity, in consequence of his having entered into the covenant contained in the contract. As to that letter and indenture, I decided, without hearing counsel for the defendant Harris, that, inasmuch as they were anterior to the delivery of the *promesse d'actions*, and any right that accrued from it, I could not deprive Harris of the benefit of such letter and indenture.

However, passing by the defendant Harris, I come to the third contract, of the 15th of June, 1853. This is the one executed subsequently to the contract for sale.

(The vice chancellor stated the contents of this contract also, as above.)

After the third contract had been so entered into, the prospectus was issued. It does not appear who was the third, if there were a third person who concurred with Twynam and Carter in issuing the prospectus; but, of course, it is impossible for Kantorowicz, claiming shares in the company, to do so in any other way than by adopting all that has been done by the committee; and, at all events, since the issuing of the prospectus, Kantorowicz has adopted and ratified it.

The prospectus is issued; it is entitled, "The Prospectus of the Wildberg Great Consolidated Mining Company, to be conducted (until a royal charter for a *societe anonyme* be obtained) under the Prussian mining law. In either case the shareholders are free from all responsibility." It names five persons as constituting the committee of management of the proposed company. The defendants, Carter and Twynam, are two of those persons; the plaintiffs, Beck, Morris and Underwood, are the other three. The prospectus, therefore, is put forward by gentlemen, two of whom were interested

directly in the contract of purchase of the 15th of June, 1853, and must, of course, have been conusant of all its contents; and they are, at the same time, professing to act as the committee of management of the intended company, and of course, therefore, for the company. Acting in those two capacities, they hold out these propositions: They first expatiate on the value of the mine, stating that a careful investigation has shown what the value of the mine is. I should state, they have previously described the capital to be £150,000; that is stated, in large letters, at the top of the prospectus. Having described the capital as £150,000, they proceed to describe the value of the mines, and then comes this passage: "A contract has been entered into," etc. (His honor read the passage, which has been already extracted, down to the words "from the day of allotment.") Then the prospectus proceeds to describe the character of the mine, and the numerous reports made favorable to its prospects, representing the whole concern, as prospectuses usually do, although it is not alleged, in this case, that it represents it erroneously, for every one seems to agree that it is a very valuable and profitable investment.

The remarkable part of the case, and that on which the defendant's counsel have mainly relied, is this: The committee, they say, have held out to the company that they may buy, for £125,000 a mine which is fully of that value. Every person who, after this, becomes a shareholder in the concern, becomes a purchaser at that price. The mine can be worked at a fair profit at that price. If so, how can any shareholder say he is defrauded in having to pay a fair price for a fair profit. There is no evidence, nor is it even alleged in the bill that any representation was ever held out to any shareholder, as to the amount of what the prospectus calls the "premium." All, therefore, of which the plaintiffs complain is simply this, that they have had to pay the sum they all agreed to pay for property which is well worth the money.

But this argument, as it appears to me, does not meet the whole of the case. The real nature of the case rests on the circumstance of Carter and Twynam, who were conusant of all the transactions, undertaking to act as agents both for the company, which they do in holding themselves forth as the

committee of management, and for the persons, who, as the prospectus expresses it, "incurred the risk and responsibility of the original purchase." Standing in that position, Carter and Twynam are not merely representing the mine as worth £125,000. Throughout the prospectus they are representing it as worth a great deal more, as a most advantageous speculation, which they, the committee of management, have secured on certain terms, those terms being £125,000, and that sum of £125,000 they say we have named, because in our judgment as to what was right and proper in the transaction, we could not estimate a less sum than that, regard being had to the necessity of providing for preliminary expenses, and for a premium to the parties who incurred the risk and responsibility of the original purchase. Dealing for the company they would be bound to keep down that premium within as reasonable bounds as they well could. They had a right to sell high, but in bringing out this concern, they were bound to make a reasonable contract; and, in their judgment, the reasonable contract was, that the premium should be £30,000. It is not stated on the face of the prospectus, but they all swear, although it hardly required their oaths because the facts unquestionably proved it, that they thought they were to pay the whole £85,714 to the original proprietors. Of course, therefore, they thought the premium would be the difference, after deducting the preliminary expenses, about £9,286, between that sum of £85,714 and the sum which they were about to fix for the company to pay; and they, exercising their best judgment on behalf of the company on the one hand, and of the vendors on the other, say to Kantorowicz and the other vendors, "we think it reasonable as between you, the vendors, and the company and we are both the company and also a portion of yourselves, that the premium should be fixed at £30,000 and, consequently, that the company should pay £125,000." Observe, when the passage occurs in which they fix that sum for the company to pay, they are explaining to those who are invited to become shareholders, the justification of so large a capital. The explanation applies not merely to the £25,000 provided for working capital but also to the amount of the purchase money.

"Among other things," they say, "we put in £25,000 for working capital. It is believed, however, that £15,000 will be sufficient, and if so, we will save it to you and will not issue the shares." Why should they not, in pursuing the same just course of dealing between the company and the proprietors, say "We believe this £30,000 premium is right and proper; we provide for it by fixing the purchase money at £125,000; but if the premium can be provided without raising so large a sum as £125,000 a smaller sum shall be raised, and the shares representing the difference shall not be issued any more than the shares representing additional working capital in the event of no such additional working capital becoming necessary."

It appears to me to be plain, that, after the prospectus was issued, which was in November, the moment any person took shares in the company, he became entitled to share in all the interest the purchasers might acquire under the contract, upon their making the declaration of complete acceptance. And for this reason I do not think it material whether the declaration was made in terms for this particular purchase, because, upon the issuing of the shares in November, the moment the mine was acquired, it was acquired of course for the benefit of the company, whoever the trustees might be that might so hold it. True, it was so acquired for their benefit, upon their paying the apparent price of £125,000; but two of the parties who were to participate in the benefit, believed that price to be necessary, in order to provide for the premium, and for preliminary expenses, and, in fixing that price, believed they were providing, and intended to provide, for a premium of £30,000, and no one of the parties ever had any notion of providing for a larger premium. Then in January, 1854, when the purchase is to be completed, and the residue of the purchase money paid, it turns out that the original proprietors, the Hunsdieckers and the widow Merttens have only to receive a trifling balance, representing some 665 shares; but for the fraudulent conduct of Kantorowicz, the premium of £30,000, as well as all preliminary expenses, might have been provided for at a price less by £20,000 and upwards than that fixed by the prospectus as the price to be paid by the company for the purchase of the mines.

I know of no case, nor is it likely that I should find one, exactly like the present; but there is a case, although I thought it had more bearing upon the present than it has, which serves to show that the mere circumstance of the company having got all that they bargained for, does not affect the matter. It is the case of *Frazer v. Jones*, 5 Hare 475, before Vice Chancellor Wigram. A person was indebted to a banking company, and, the banking company pressing for a security, he gave them a security reciting, but falsely, that he had deposited the deed, of which the security consisted, with one John Jones, to secure £1,000 and interest due from him to John Jones, his object being not only to reserve to himself the benefit of the security to the extent of the £1,000 and interest, but also to retain the deed for future emergencies. And in fact he went afterward to the identical John Jones, and borrowed money of him, depositing the deed as a security. The question was as to the priorities of the two mortgagees, John Jones and the banking company, both being equally innocent. The vice chancellor decided in favor of the banking company. He said it was true that the banking company would have all they contracted for, even if they were postponed, and they were in truth contending for the benefit of a rule of law which entitled them to a better security than they expected to obtain; but, on the other hand, he could not tell what terms they would have made had they known the truth; further than that, the legal interest had been conveyed to them subject to a non-entity. If John Jones had really taken the security which the mortgagor recited that he had, and the mortgagor had afterward paid off that charge, the company would have taken the property.

The case was eventually determined upon this latter ground, viz., by reference to the legal interest of the parties, but it is an authority for the proposition, that, even in the case of persons equally innocent, the circumstance that the one who comes into equity for relief, will lose no part of his bargain if that relief is withheld, is not an answer to a case of this description. Here the company get their whole bargain, even if they pay £125,000 for the mine; but they had a right, as against the members of the committee of management, to the best bargain that the latter, had they known the

facts, would have been in a position, acting fairly and rightly, to give them. The committee, one and all, distinctly depose, and Werninck and Moriarty depose that their intent was thus to act. They comprise four of the five parties to the original contract for the purchase of the mine, and any three can sell. All of the parties, I may say, agreeing to the sale for this particular purpose, it is not competent to Kantorowicz to keep back the transaction by which he gets this bonus of £20,000, in addition to his share of the premium. Having kept back that transaction, he must be taken to have joined with his co-vendors in contracting for the £30,000 premium and no more. He has allowed them, in the exercise of their judgment as to what was a right premium to demand of the company, to contract with the company for the £30,000, and that contract, as it appears to me, is the one which ought to be performed as between the company and the defendants Carter and Twynam, and the other parties who concurred with him in the original purchase.

That being so, the assignment by Kantorowicz of the *promesse d'actions*, as it was a fraud against Carter and Twynam and the rest of his co-purchasers, so was it a fraud against the company who had, through the agency of the vendors, a contract for the purchase.

The case is not free from difficulty, but I think that is the plain sense and honesty of the transaction.

Minute of decree:—Declare that the defendants Kantorowicz and Kalb respectively are not entitled, as against the plaintiffs and the other shareholders in the company, to the benefit of any of the 10,725 shares contracted to be given by the *promesse d'actions* in the bill mentioned for that such *promesse d'actions* is fraudulent and void as against the plaintiffs and such other shareholders, except so far as the same relates to 665 shares in the company secured or promised to be allotted to the widows Hunsdiecker and Merttens, and Leopold Hunsdiecker, the original vendors of the mines in the bill mentioned.

Declare that the defendant Harris is entitled, under and by virtue of the letter of the 15th of June, 1853, and the indenture of the 20th of July, 1853, in the pleadings mentioned to a charge on the 2,425 shares in the company, and the sum of

£802 3s. 9d. now in the hands of the defendants Carter and Twynam as a security for any moneys due him under and by virtue of such letter and indenture; and that subject to such charge, the plaintiffs, on behalf of themselves and the other shareholders in the company, are entitled to a lien on the last-mentioned shares and sum of £802 3s. 9d., by way of indemnity against any demand which may be made by the defendants Kantorowicz and Kalb, or either of them, for a transfer or allotment of shares in respect of the *promesse d'actions* and also in respect of this suit, and the two suits of *Kalb v. Kantorowicz* and *Kantorowicz v. Carter*, but not including the costs of the suit in the Prussian courts.

Dismiss the bill in *Kantorowicz v. Carter*, with costs.

HAYWOOD V. COPE.

(25 Beavan, 140. The Rolls Court, 1858.)

Description in preliminary contract. Defendant, by contract in writing, agreed with plaintiff to take a lease of "those two seams of coal known as the two feet coal, and the three feet coal, lying under lands to be hereafter defined, in the Bank End estate": *Held*, that the contract was sufficiently definite to be enforced, and that its true construction was, that the bounds, not of the seams but of the estate, were to be in the lease.

Unexecuted paper not evidence. A draft lease was prepared by the lessor in pursuance of the within contract, which was not objected to by the lessee who afterward refused to complete: *Held*, that the draft lease could not be used for the purpose of controlling or explaining the contract itself.

Concealment of the fact of unprofitable working. Plaintiff had worked the coal under his estate, but abandoned it as unprofitable. Twenty years afterward the defendant cleared the pit, examined the coal in the shaft, with other persons, and subsequently contracted for a lease: *Held*, that he could not resist a specific performance on the ground of plaintiff not having communicated to him the fact of his having worked the mine and found it unprofitable.

Ignorance of lessee—Subsequent failure of mine. A person contracting for the lease of a mine can not resist a specific performance on the ground of his ignorance of mining matters and of the mine turning out worthless.

¹ Discretion defined—Inadequate consideration, no defense, to specific performance. Specific performance is a matter of discretion to be exercised, however, according to fixed and settled rules and the mere inadequacy of consideration is not a ground for exercising such discretion by refusing a specific performance.

Taking possession of the mine by intended lessee, *held* not to be an acceptance of the title.

The plaintiff was seized of a farm called the *Bank End farm*, situate in the parish of *Norton* in the *Moors* in *Staffordshire*, and of the coals and minerals under it, and for working which shafts had been previously sunk, which had been visibly abandoned. The farm consisted of about twenty-seven acres, two roods and two perches.

The defendant applied to the plaintiff for a lease of the coal mines, and after some negotiations, and after the defendant, accompanied by some friends, had examined the shaft as far as was possible, the plaintiff and defendant on the 15th of January, 1855, signed the following agreement: "Mr. Charles Cope agrees with *Howard Haywood, Esq.*, for those two seams of coals known as the two-feet coal and three-feet coal, lying under lands to be hereafter defined, in the *Bank End estate*, near *Norton*, in the county of *Stafford*, at the rate of nine pence per ton for all coals and slack going over a weighing machine, 112 pounds to hundred-weight, or 2,240 pounds per ton; minimum rent, £100 per annum on lease of fourteen years, Mr. Cope to pay for all surface trespass at the rate of £5 per acre, to commence paying minimum rent within eighteen months from date of agreement, all coals and slack sold or raised in the intermediate time to be paid for at the rate of nine pence per ton. *Howard Raymond, Esq.*, agrees to let to Mr. Charles Cope the before mentioned two seams of coals at the price before mentioned." Shortly after the agreement had been signed the defendant entered into possession. He commenced working the coal mines, and he

¹ The definition of discretion in the text almost eliminates the idea of volition. Compare *Fisher v. Worrall*, 5 W. & S. 478 (*post* *VENDOR AND PURCHASER*); *Frisby v. Ballance*, 4 Scam. 287; 39 Am. Dec. 409, and *Rust v. Conrad*, 47 Mich. 449; 41 Am. R. 720; where the elements of misapprehension and oppression are considered as matters affecting the discretion. See also *Murdoch v. Fullerton*, L. R. 2 Sc. App. 273.

continued to work them regularly until July, 1855, and off and on until October, 1856.

On the 26th of May, 1855, the plaintiff's solicitor forwarded to the defendant, for his approval, a draft lease, in which the particulars of the land under which the mines lay, were defined and scheduled. The defendant made no objection to the draft, and retained it, notwithstanding various applications made to him to return it. At Christmas, 1856, the defendant first objected that the coals had not turned out so well as he expected, and in January, 1857, he declined to accept a lease "on the ground that the mines were not, as he alleged, what they were represented to be, either as to thickness or quality, and that his surveyor had stated that the coal was absolutely not worth getting." The defendant afterward returned the draft lease.

On the 26th of March, 1857, the plaintiff filed this bill for a specific performance of the contract, for an account of the coal worked, and for payment by the defendant of the royalty and rent.

The defendant resisted the specific performance on the ground of the uncertainty of the contract, of the misrepresentation and concealment of the plaintiff, of the delay which had occurred, and of the hardship of being obliged to pay £100 a year during the remainder of the time without receiving any benefit from the mines.

Mr. SELWYN, Mr. HADDEN and Mr. JESSEL, for the plaintiff.

The defendant principally relies on misrepresentation and concealment, but there has been none; the defendant examined the mine and acted on his own judgment; he can not now repudiate the contract, merely because the collieries have turned out less profitable than he anticipated.

The rule of law as to concealment of the defects in the property sold is thus laid down by Sir Edward Sugden, 1 Sugden's Vendors and Purchasers, pp. 1, 2: "1. Moral writers insist that a vendor is bound in *foro conscientiæ* to acquaint a purchaser with the defects of the subject of the contract. Arguments of some force have, however, been advanced in favor of the contrary doctrine; and our law does not entirely coincide with this strict precept of morality. Even if the purchaser was, at the time of the contract, ignorant of the defects and

the vendor was acquainted with them, and did not disclose them to the purchaser, yet if they were patent, and could have been discovered by a vigilant man, no relief will be granted against the vendor."

So in *Atwood v. Small*, 6 Cl. & Fin. 232, it was held, "that if a purchaser, choosing to judge for himself, does not avail himself of the knowledge, or means of knowledge, open to him or to his agents, he can not be heard to say he was deceived by the vendor's representations, the rule being *caveat emptor*, and the knowledge of his agents being as binding on him as his own knowledge."

Mining operations are always of a doubtful and speculative character; the defendant had the same sources of information open to him as the plaintiff, and he availed himself of them; he can not, therefore, complain: *Jennings v. Broughton*, 17 Beav. 234. In *Clapham v. Shillito*, 1 Beav. 146, Lord LANGDALE thus states the law: "Cases have frequently occurred in which, upon entering into contract, misrepresentation, made by one party have not been, in any degree, relied on by the other party. If the party to whom the representations were made himself resorted to the proper means of verification, before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which, upon due inquiry he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded."

"Again, when we are endeavoring to ascertain what reliance was placed on representations, we must consider them with reference to the subject-matter, and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into, after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed that the ignorant man relied on the

statements made by him who was supposed to be better informed; but if the subject is in its nature uncertain, if all that is known about it is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge and means of acquiring knowledge and equal skill, it is not easy to presume that representations made by one would have much or any influence upon the other."

Mr. R. PALMER and Mr. SOUTHGATE, for the defendant.

This is not a contract of which the court will decree the specific performance.

First. It is too vague and uncertain in its terms; it is something "to be hereafter defined."

Secondly. There was misrepresentation by the plaintiff's agent, both as to the quality and thickness of the seam of coal, and the coal turned out to be impregnated with sulphur, and unfit for domestic use; the fact that an attempt had been made by the plaintiff to work the mine, which altogether failed, was carefully concealed by the plaintiff from the defendant.

Thirdly. There has been so great a delay on the part of the plaintiff in enforcing the contract, that the court will not interfere in his favor: *Watson v. Reid*, 1 Russ. & Myl. 236; *Southcomb v. The Bishop of Exeter*, 6 Hare, 213; and time is more essential in the case of mines than of other property: *Macbryde v. Weekes*, 22 Beav. 533.

Fourthly. The court, in cases of specific performance, exercises a discretion, and in cases of hardship will not interfere, but leave the plaintiff to his remedy at law: *Day v. Newman*, 2 Cox, 77; *Wedgwood v. Alams*, 6 Beav. 600; *Watson v. Marston*, 4 De Gex, M. & G. 230. Here it would be unreasonable to inflict on the defendant the liabilities of a lease when the mine is confessedly worthless.

Fifthly. On another point, as to aiding the original contract by subsequent declarations and the draft lease, they cited *Boydelle v. Drummond*, 11 East. 142; *Brodie v. St. Paul*, 1 Ves. Jun. 326; *Kenworthy v. Schofield*, 2 Barn. & C. 945; Sugden's Vendors and Purchasers, page 180, 11th ed.

Mr. SELWYN, being called on to reply as to the uncertainty

of the agreement, argued, that there was sufficient certainty in the agreement as to the subject to be leased; it was the two seams of coal under the plaintiff's estate, and that which was "to be hereafter defined" was the boundary of the estate. He referred to *Owen v. Thomas*, 3 Myl. & K. 353, in which there was a contract to sell "the house in Newport," without any further description, except that the contract referred to the deeds being in the possession of Mr. D——. It was held that the subject of the contract was sufficiently defined. He further argued, that the point was not raised on the pleadings, and that the draft lease, which had never been objected to, contained the boundaries of the property, and completely removed all doubt or difficulty on the subject.

The Master of the Rolls—I am of the opinion that the plaintiff is entitled to a decree for specific performance.

The first objection is upon the terms of the contract, which are said to be too vague to be carried into effect.

The words are these: Cope agrees with Hayward "for these two seams of coal, known as the 'two-feet coal' and the 'three-feet coal,' " lying under lands to be hereafter defined in the Bank End estate, near Norton, and Mr. Hayward agrees to let to Cope the before mentioned two seams, at the price before mentioned. It is said that this is an agreement to lease an uncertain quantity of land, and therefore that it is too vague to be enforced. It is so if this be the right construction of the contract. But, on the other hand, it is said, the proper way to read it is this: As an agreement to lease two seams of coal, lying under the lands of the Bank End estate, the boundaries of which are to be hereafter described and defined.

I think this is the correct meaning of the contract, and this appears to have been the meaning of the contract attached to it by the parties themselves on both sides.

I find from the evidence, that the Bank End estate is not an indefinite or large tract, but is a name given to a small farm belonging to the plaintiff, containing between twenty-seven and twenty-eight acres of land. I find that though contests have arisen between the plaintiff and defendant on the subject of the contract, yet that it was never suggested, until the papers came before the professional advisers, that the subject-matter of the contract was in doubt, or that the extent of

the land under which the coal was intended to be demised, was a matter of doubt, and one to be afterward settled and agreed on; on the contrary, when the draft lease was prepared and sent to the defendant, in May, 1855, no observation was made with respect to the description or extent of the parcels as contained in that document.

It is quite clear, as has been observed, that this document can not be used for the purpose of controlling or explaining the contents of the contract itself, but it does show what was the intention, and that no doubt existed in the mind of the parties themselves with reference to the meaning of that contract. I think the construction I have put on this document, which is the plain and natural one, is that which the parties themselves put upon it; and that it never entered into the heads of either of them, until the suit was instituted, that the whole of the two seams of coal under the Bank End estate was not to be demised, but only some portion of it, which was afterward to be agreed on. I believe that the defendant considered himself entitled to work any part of the coal under the farm, and the words, "to be afterward defined" merely meant this: That there was to be an accurate description of the farm under which the coal was to be taken.

The objection therefore, which was previously put forward on the construction of the contract, in my opinion, fails.

The next objection is the misrepresentation or rather a suppression of the truth. It is shown that twenty years before the contract, the plaintiff worked these seams of coal, and then abandoned the work because it was not profitable. I think this objection also fails. There were two pits on the ground. Before entering into the arrangement with the plaintiff, the defendant applied for leave to have these pits, or one of them at least, cleared, that he might be at liberty to examine the coal in the shaft. This was done. He went down himself and took with him three other persons, for the purpose of examining and ascertaining the value and nature of the seams of coal. It was not till after this had been done that he entered into this agreement with the plaintiff. He says that he had no knowledge of mines and coal, and that he was wholly ignorant of these matters. He ought then to have employed some person who had a proper knowledge for that purpose, which I believe he did. It would be no excuse for a man,

who had himself personally inspected a house for the purpose of seeing whether it was in a proper state of repair, afterward to contradict his own judgment, on the ground that he was not a surveyor, and was unable to say whether the house was in sufficient repair or not. Here he did not trust to his own judgment, but as I have already observed, three other persons accompanied him, some of whom seem to have given him their opinion.

With reference to Mr. Brindley, I think it very immaterial whether he did or did not state the words which are imputed to him. I see no reason to doubt that what he said, if he said anything, was *bona fide* and that he *bona fide* believed it was the real value of the land, and the evidence satisfies me that the defendant took the lease, not on the faith of the representations of Brindley, if he made any, but on his own opinion and that of others, as to the value of the mine to be worked.

The next question is, was the plaintiff bound to say that he had worked the mine and that he had found it unprofitable?

That some one had worked and abandoned it was obvious, for there were the shafts and the abandoned workings which the defendant examined. Was it incumbent on the plaintiff to inform him that he was the person who had worked it some twenty years before, and found it to be not worth working? It is to be observed, that the subject-matter of this contract is a mine, that is to say, seams of coal, which may turn out better or worse, and is always, in some degree, a speculation. It may turn out better, or it may turn out worse; and it is well known that leases and sales are always made with reference to this circumstance. With the exception of knowing that the plaintiff had worked it, the defendant knew as much as anybody could know by his own examination; but whether the seams were to improve or to deteriorate was a matter which could only be ascertained by the future working. They have turned out ill; but the consequence of that is not, in my opinion, that the defendant can reject the contract, any more than the plaintiff could have rejected it, or have demanded higher terms, if the seams had turned out profitable.

Another objection is the length of time that has elapsed before the bill was filed. This also appears to me to fail. The defendant received the proposed draft of the lease in May, 1855. He continued working it till July, 1855. He

then complained of the mine, and said it must be abandoned; but it appears from the evidence, that he worked the mine, on and off, down to October, 1856.

The solicitor of the plaintiff, who sent the draft of the lease on the 26th of May, 1855, also says, that he received no communication of any sort from the defendant or his solicitor, in answer, till the month of January, 1857, when the defendant's solicitor came to him and stated that the defendant was desirous of abandoning the agreement, upon which the plaintiff's solicitor said: "You must put that proposal in writing." And, accordingly, he sends in a proposal to that effect in writing, which was declined on the 2nd day of February 1857, and the bill was filed on the 26th of March following.

In order to have entitled the defendant to make time an element in this matter, he ought to have given the plaintiff a formal notice that he repudiated the agreement, that he had abandoned the mine, and would have nothing more to do with the transaction. If this had been done, and the plaintiff had not, after a considerable length of time, proceeded with due diligence, then undoubtedly the court would not have allowed him to have enforced the contract; but here I find that the defendant worked regularly until July, 1856. He went on trying it more or less until October, 1856, and in January, 1857, he makes a written proposal as to the abandonment of it, and the bill is filed in March, 1857. The real fact is that the speculation has turned out extremely bad, and this is shown by the evidence. The seam dwindled down from three feet to twenty inches, but if instead of diminishing it had increased to that extent, the court would probably have heard nothing about it.

Then it is said that this is an extremely hard case; that, in point of fact, the plaintiff is insisting upon the defendant paying him £1,400 for a thing that has turned out to be literally worth nothing, and that according to the discretion which the court exercises in such cases, it can not compel specific performance of the contract. Upon this subject, which is one upon which I have before made several observations, I will refer again to a passage which I have always considered binding upon me, for it is most important that the profession, and those who have to advise in reference to this subject, should understand the rule which is adopted in this and the

other courts, which is that the discretion of the court must be exercised according to fixed and settled rules; you can not exercise a discretion by merely considering what, as between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised. Lord ELDON observed in the case of *White v. Damon*, 7 Ves. 35, "I agree with Lord ROSSELYN that giving specific performance is matter of discretion; but that is not an arbitrary capricious discretion. It must be regulated upon grounds that will make it judicial." I also refer, as I believe I have upon former occasions, to a passage in the celebrated argument of the master of the rolls in *Burgess v. Wheate*, 1 Eden, p. 214, where at the conclusion he cites a well known passage from Sir Joseph Jekyll's judgment, in *Cowper v. Earl Cowper*, 8 Peere W. 752, 753, upon the subject of the discretion of the court, and gives his own opinion. He says, "and though proceedings in equity are said to be *secundem discretionem boni viri* yet, when it is asked *vir bonus est quis* the answer is, *qui consulta patrum qui leges juraque servat*. And as it is said in *Rooke's case*, 5 Rep. 99, B., that discretion is a science, not to act arbitrarily according to men's will and private affections, so the discretion which is to be exercised here is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to the other. This discretion in some cases follows the law implicitly; in others assists it and advances the remedy; in others, again, it relieves against the abuse or allays the rigor of it; but in no case does it contradict or overturn the grounds and principles thereof, as have been sometimes been ignorantly imputed to this court. That is a discretionary power which neither this nor any other court, not even the highest acting in a judicial capacity, is by the constitution entrusted with. This description is full and judicious, and what ought to be imprinted upon the mind of every judge:" 1 Eden, p. 214.

If, therefore, in a case of this description I were to say that according to my discretion I ought to leave these persons to their action at law, upon what principle or ground could I do it except that in a matter of speculation it has turned out very favorable to one party, and very unfavorable to the other.

It is obvious that in the case of a sale by auction, if the property is sold for an extremely inadequate value, it is impossible for the person to repudiate the contract. The mere principle of what might have been fair, or what might have been a right thing to do between the parties, had all the elements of value been known which have since transpired, can not be a ground for exercising or regulating the discretion of the court when all the facts which were then in existence were known to both parties. I can understand that the court will exercise a discretion and will not enforce the specific performance of a contract, where to decree the performance of the contract will be to compel a person, who has entered inadvertently into it to commit a breach of duty, such as where trustees have entered into a contract, the performance of which would be a breach of trust. Those are cases where, by a fixed and settled rule, the court is enabled to exercise its discretion; but the mere inadequacy or excess of value is not, in my opinion, a ground for exercising any such discretion as that which is suggested in this case. That this is a very hard case there is no doubt, and it may be extremely proper for the plaintiff to make an abatement in respect of it; but that is a totally different matter, one which is in the *forum* of his own conscience, but not one which I can notice judicially. In my opinion, this is a contract which was fairly entered into between the parties; there is nothing to invalidate it, and the usual decree must therefore be made for the specific performance of the contract, with costs to the present time. A reference must be directed to chambers to settle the lease in case the parties differ.

A question was then raised, whether the defendant had waived his right of objecting to the title.

The Master of the Rolls—The draft lease was sent in May, 1855, and the mine turned out unprofitable in the July following. If the defendant in May, 1855, had required to see the plaintiff's title, I should have allowed him, and I should not have thought that the possession of the mine was an acceptance of the title. It is so necessary that immediate possession should be given of mining property under a term which is running out, I think I can not hold that the defendant has accepted the title; and if he asks for a reference on that point he must have it. It is not necessary to inquire when it was

first shown because that would not affect my making the defendant pay the costs down to the present time; for, in my opinion, there was no reason for resisting the contract. There will be a reference to chambers to settle the terms of the lease in case the parties differ, and whether the plaintiff can make a good title.

¹ BAGSHAW V. SEYMOUR.

(4 Common Bench, N. S. 873. In the House of Lords, 1858.)

Liability for placing Company on the Stock Exchange by false representations. Defendant, the chairman of a mining company by falsely representing to the Stock Exchange that two thirds of the shares had been taken and paid upon, procured the stock to be entered on the official list. Plaintiff, a stranger, knowing the rule that such stock was not admitted unless these conditions were complied with, seeing the stock so entered and relying on the insertion having been procured by honest means, bought some shares from a jobber on the Exchange. *Held* (affirming the judgment of the Exchequer Chamber), that plaintiff had a right of action for the fraudulent representation.

This was an action for a fraudulent representation by a director of a mining company.

The action was commenced in the Court of Common Pleas on the 13th July, 1854.

The declaration alleged that the defendant and others had associated themselves together as a company called "The Lake Bathurst Australasian Gold Mining Company," established on the cost-book system for working certain mines in Australia; that the defendant and others representing themselves to be the board of management of the said company, allotted and issued shares, and issued and circulated for the purpose of inducing persons to purchase the said shares, a certain prospectus containing a statement that the capital of the company was £100,000, in 100,000 paid up shares of £1 each, without any further call or liability; and whereas before and at the time of issuing such prospectus it was, as the defendant well knew, publicly known and understood, and the fact was, that the

¹ See *Bedford v. Bagshaw*, 6 M. R. 514.

committee of the Stock Exchange would not appoint a settling day for shares in any mining company, or permit the same to be inserted in the official list of the said committee until it had been represented to the said committee, and they had been induced to believe that the subscription list of such company was full, with the exception of such shares as might be reserved for special purposes; that not less than two thirds of the scrip had been paid upon and were ready to be issued, and that there was no impediment to the settlement of the account; that the defendant and the said other persons, in order to procure the insertion of the shares of the said company in the official list of the said committee, and to induce the said committee to appoint a settling day for the said shares, and thus to induce persons to purchase shares in the said company, in the belief that their insertion in the said list had been procured by fair and honest means after the issuing of the said shares and prospectus, and before the plaintiff purchased any shares falsely and fraudulently represented to the said committee that 40,000 shares had been *bona fide* reserved for the purpose of completing the purchase of the land; that 19289 shares had been *bona fide* kept for circulation in the colony of Australia, and that the residue, viz., 40,711 shares, had been paid upon and for all which scrip certificates had been issued or were ready for delivery, and in order to induce the committee so to believe, the defendant and others falsely and fraudulently represented to them that the produce of the said residue had been received by and then was in the hands of their bankers, and thereby the defendant and the said others, for the purpose aforesaid, induced the said committee to believe the said representations to be true, and that there was no impediment to the settlement of the account, and influenced by and acting on such belief the said committee inserted the shares of the said company in the official list of the said committee, and appointed a settling day for shares in the said company.

It was further alleged that afterward, and whilst the said shares were so inserted in the said official list, the plaintiff having notice of the prospectus and having seen the said shares quoted in the official list of the said committee of the Stock Exchange, and believing that the same had been admitted and

inserted by fair, honest and proper means, and that no less than two thirds of the scrip had been paid upon and was ready for delivery and that the subscription list was full, with the exception aforesaid, was induced to purchase and did purchase on the Stock Exchange, of one John Barclay, one hundred shares in the said company for the price or sum of £93,15s., being part of the shares so issued by the defendant and others as aforesaid. It then alleged that the defendant in and by the said several representations deceived and defrauded the plaintiff in this; that neither at the time of making the said representations to the said committee of the Stock Exchange nor at the time when the shares of the company were inserted in the said official list, and when the plaintiff saw them, nor at any other time, had 40,000 shares or any shares been *bona fide* reserved, etc., nor had 19,289 shares been reserved, etc., nor had the said 40,711 nor two thirds of the said scrip, with the exception aforesaid, been subscribed for or paid upon, nor were they ready to be issued or delivered, nor had the produce thereof been received by, nor was it in the hands of their said bankers; and the said shares ought not to have been inserted in such official list; all which the defendant always well knew. By means of which said several premises, the shares so purchased by the plaintiff were of no value, etc. And the plaintiff claims £150.

Pleas: 1. Not guilty. 2. The plaintiff was not induced for the cause alleged to make the purchase in the declaration mentioned. 3. The plaintiff did not purchase as alleged. Issue thereon.

At the trial, which took place before JERVIS, C. J., at the London sittings, on the 23d June, 1855, the plaintiff gave in evidence as follows: The defendant was the chairman of the directors, and had published the prospectus in the declaration mentioned, and issued some shares for sale, including those bought by the plaintiff. There was a rule on the Stock Exchange, known to the plaintiff and defendant, to the effect stated in the declaration. That the defendant and other directors addressed a letter to the committee of the Stock Exchange, alleging that their share list was full, with the exceptions stated in the declaration, and that two thirds of the scrip had been paid on and were issued or ready for delivery. In

order to satisfy the Stock Exchange of this fact, they procured by loan, or otherwise than by sale of shares, a sum of £35,000, which they paid into the bank, and procured from the bankers, certificates which they enclosed, purporting that the sum in question stood to the credit of the company; and immediately afterward, when the Stock Exchange had appointed a settling day, the said sum was withdrawn by checks signed by the defendant and others. The plaintiff further proved that the statements in the letter were false to the knowledge of the defendant, and that two thirds of the scrip had not been paid upon; but that the exchange committee acted on the faith of the banker's certificate, and appointed a settling day. The plaintiff saw the shares quoted in the official list, and on the faith of the rule having been complied with, bought the shares from a jobber in the market. The defendant's counsel insisted that there was no evidence to go to the jury, and that there was no proof of any fraud by the defendant, or that the damage, if any, was brought about by such fraud, if any; that the evidence did not show any contract between the plaintiff and the defendant, nor any duty in the defendant as between him and the plaintiff, nor any connection between them in respect of the subject-matter in question, to entitle the plaintiff to recover on the facts proved.

The learned judge, however, told the jury that, if the plaintiff was induced, by seeing the shares quoted in the official list of the Stock Exchange, to purchase the same, and if the jury believe that the insertion of the said shares in such list was procured by the false and fraudulent representations of the defendant, then the plaintiff was entitled to recover. A bill of exceptions was then tendered, and the jury gave their verdict for the plaintiff; damages, £93 15s.

Error being suggested to the Exchequer Chamber, the counsel for the plaintiff in error did not in that court argue the matter, being advised that it would be desirable to bring the case before the House of Lords, and the judgment of the common pleas was thereupon affirmed without argument.

Error was then suggested to the House of Lords, and the plaintiff in error gave the following reasons for reversal in his printed case: "The declaration does not disclose a matter which is properly the subject of an action by the plaintiff

below against the defendant below. That it shows no contract express or implied between them, and no duty as between them, the breach of which can be the subject of an action. That for aught that appears by the declaration, John Barclay, the seller of the shares to the plaintiff below, had purchased them from another who had also purchased them under the same circumstances as those disclosed by the declaration relating to the plaintiff; and that if the plaintiff is entitled to maintain this action, any person who had been at any time a purchaser of any one share under the same circumstances would be entitled to maintain a similar action—a proposition for which the defendant submitted there was no authority.”

In the defendant in error’s printed case, the following reason for affirming the judgment was given: “Because a false and fraudulent representation made by A to the public, calculated and intended to deceive by inducing persons to purchase for value that which is worthless, affords a ground of action against A to any person who is deceived and who purchases and suffers damage thereby, in the same manner and to the same extent as if the representation had been made directly by A to such person.”

C. CLARK, for the plaintiff in error, on the case being called, said that he did not think he could usefully occupy the time of the House by arguing it, and would at once submit to a judgment for the defendant in error.

QUAIN, for the defendant in error.

Judgment for defendant in error.

¹ BEDFORD V. BAGSHAW.

(4 Hurlstone & Norman, 538. Court of Exchequer, 1859.)

Action against director fraudulently placing company on Stock Exchange. By rule of the Stock Exchange no mining company could be inserted in the official list unless its subscription list was full and not less than two thirds of its scrip paid up. Defendant, a director in a mining company, having falsely represented that these facts existed in the case of his company, it was quoted in the official list. The plaintiff, knowing the rule, bought on the Stock Exchange 200 shares. It was

¹ Approving *Bagshaw v. Seymour*, 6 M. R. 510.

proved that less than one fifth of the shares were allotted, and less than one tenth ever paid. The shares turned out to be valueless. *Held*, that an action was maintainable by plaintiff against defendant for the fraudulent representations made by him.

Misrepresentations made for general circulation. A man may not be liable for the remote results of every untrue statement he may make; but he is liable for the consequences of a fraudulent misrepresentation intended to be generally circulated, to those persons who are injured by acting upon it.

DECLARATION.—That before the committing of the grievances the defendant and divers other persons had associated themselves together as a company, called "The Lake Bathurst Australian Gold Mining Company," established or alleged to be established on the cost-book system, for working certain deposits of alluvial gold, and the mines of gold quartz alleged to have been discovered on 500 acres of freehold land purchased by the said company in Australia; and the defendant and the said other persons, assuming and representing themselves to be the board of management of such company, allotted and issued divers large quantities of shares of and in the said company; and also issued, published and circulated for the purpose of inducing persons to take shares in the said company, a prospectus and advertisement, in which it was, amongst other things, stated and represented that the capital of the company was £100,000 in 100,000 paid up shares of £1 each, without any further call or liability; that, before, and at the time of issuing the prospectus, and from thence until this suit, it was publicly known and understood, as the defendant well knew, and as the fact was, that the committee of the Stock Exchange in London would not appoint a settling day for shares in any mining company, or permit the same to be inserted in the official list of the said committee, until it had been represented to the said committee, and the said committee had been induced to believe that the subscription list of such company was full, with the exception of such shares as might be reserved for special purposes; that not less than two thirds of the scrip had been paid upon and were ready to be issued, and that there was no impediment to the settlement of the account; that the defendant and the said other persons, in order to procure the insertion of the shares of the company in the official list of the committee, and to induce the committee to appoint a settling day for the said shares, and

to induce persons to purchase the same in the belief that their insertion in the said list had been procured by fair, honest and proper means, after the issuing of the said shares and prospectus, and before the making of the purchase by the plaintiff hereinafter mentioned, falsely and fraudulently represented to the said committee that 40,000 shares had been and were *bona fide* reserved for the purpose of completing the purchase of the said land; that 19,289 shares had been and were *bona fide* kept for circulation in the said colony of Australia, or for such other purposes as might be resolved upon thereafter, and that the residue, that is to say 40,711 shares, had been paid upon, and for all of which scrip certificates had been issued or were ready for delivery; and in order to induce the said company to believe the said representations, the defendant and the said other persons falsely and fraudulently represented to the said committee that the produce of the said 40,711 shares had been received by them, and was then in the hands of their bankers, and to the credit of the defendant and the said other persons as directors of such company, and thereby the defendant and the said other persons, for the purpose and to the intent aforesaid, induced the said committee, and the said committee were thereby induced, to believe the said representations to be true, and that there was no impediment to the settling of the account, and, influenced by and acting upon such belief, the said committee did before the said purchase by the plaintiff hereinafter mentioned, insert the shares of the said company in the official list of the said committee and appoint a settling day for shares in the said company; that afterward, and before this suit, and whilst the shares continued to be inserted in the official list, the plaintiff, having notice of the prospectus and advertisement, and having seen the shares quoted and inserted in the official list of the committee of the Stock Exchange, and believing thereby that the same had been admitted and inserted in such official list by fair, honest and proper means, and that the subscription list of the company was full, with the exception as aforesaid, and that not less than two thirds of the scrip of the company had been paid upon, and either had been issued or were ready to be issued, and relying thereon, was thereby induced to purchase, and did purchase, in the Stock Exchange in London 200 shares in the company for £100,

and paid £5 for commission on such purchase, and the plaintiff from the time of such purchase has held and now holds the said shares so purchased by him as aforesaid, the same being shares issued by the defendant and the said other persons as aforesaid.

Averments—That the defendant at the several times aforesaid, by the several representations hereinbefore mentioned, deceived and defrauded the plaintiff in this, that at the time of making the said representations to the committee of the Stock Exchange, or at the time when the shares of the company were inserted in the official list of the said committee and when the plaintiff saw the same so inserted, or at any other time, 40,000 shares, or any shares, had not been *bona fide* reserved for the purpose of completing the purchase of the said land, nor had the 19,289 or any shares been *bona fide* reserved for circulation in the said colony, nor had the 40,711 shares or two thirds of the said receipt been subscribed for or paid upon, nor were the same issued or ready for delivery, nor had the produce thereof been received by, nor was it in the hands of the said bankers, and the said shares ought not to have been inserted in the official list, all which the defendants always well knew, by means whereof, etc. There was a second count for falsely and fraudulently representing that the company was likely to be a safe and profitable undertaking.

Pleas.—First. Not guilty.

Second. That the plaintiff was not induced to purchase the shares as alleged.

Third. To the first count—Denial of whatever is therein alleged as to the practice or proceedings of the committee of the Stock Exchange, and as to the public knowledge and understanding thereof, and the knowledge thereof by the defendant.

Fifth. Statute of Limitations.

At the trial before POLLOCK, C. B., at the sittings in London after Hilary Term, the plaintiff proved that, having seen the shares of "The Lake Bathurst Australian Gold Mining Compay, in 100,000 shares £1 each, quoted in the printed list of the Stock Exchange and in the newspapers, finding them low in price, and knowing that a large portion

of the capital must have been paid up to entitle them to such quotation, he bought 200 shares for £100, and paid £5 for brokerage. He said that he believed the scheme would not be a successful one, but having been informed by his brokers that two-thirds of the capital must have been paid up, and relying on the quotation in the official list, he felt satisfied that there would be sufficient to pay the shareholders 15s a share. It further appeared that 150 of these shares had been issued to Messrs. Harvey and Iron, the persons who had contracted to sell to the company the land mentioned in the declaration for 20,000 shares and £20,000, to be paid by certain installments, when the shares should have been allotted, and £20,000 should have been paid to the bankers of the company; and that the shares had been delivered to such persons under an agreement that they should not send them into the market.

It appeared from the evidence of the secretary that the defendant was present as chairman at a meeting of the board of directors on the 16th of March, 1853, when the secretary reported that 19,183 shares had been allotted to applicants, but only 6,748 had up to that time been actually paid upon; and it was resolved that a further allotment of 14,500 shares should be made; and as it appeared that notwithstanding such extra issue the requirements of the Stock Exchange committee on the granting a settling day would still not be met, it was resolved "that steps be taken to issue shares to the public to the amount necessary, and that in the meantime the members of the board undertake to provide the funds, to be repaid by the sale of the shares." At a meeting of the board on the 10th of April, at which the defendant presided, it was ordered that Messrs. Foster, the brokers of the company, should apply to the committee of the Stock Exchange for a settling day, and that the following letter should be sent to the secretary of the Stock Exchange, which was done accordingly.

"April 12.

"M. SLAUGHTER, Esq., Secretary to the Stock Exchange.

"SIR:—In reply to yours of the 10th, I beg to forward you the following particulars relating to the above company. That 40,711 shares have been paid up, for all of which scrip certificates have been issued or are ready for delivery on application, at the office as advertised in the Times; that the

company have made a reservation of 40,000 shares for the purpose of completing the purchase of land, etc., as agreed on with the vendors, which shares are in the hands and under the control of the directors, to be applied to that purpose only; that the residue of the shares amounting to 19,289, being less than one third, are kept for circulation in the colony or such other purposes as may be resolved on hereafter. I beg also to enclose two certificates from the company's bankers, etc.

"It will be seen from the constitution of the company that no deed is required.

"Yours, etc.,

"R. PONEY, Secretary."

The letter was accompanied by the banker's certificates, stating that £40,911 4s. 2d. stood to the credit of the directors of the company in their books.

This letter was in answer to one written by the secretary of the Stock Exchange, as follows:

"SIR:—Application having been made to the committee of the Stock Exchange to appoint a settling day in the shares of the Lake Bathurst Australian Gold Mining Company, I beg to inform you that in such cases we are accustomed to require from the secretary of the company a certificate to the effect following: viz., that the subscription list is full, with the exception of such shares as may be reserved for special purposes; that not less than two thirds of the scrip have been paid upon and all ready to be issued, and that the period publicly advertised for signing the deeds has expired. In addition to this certificate the committee require that the company's bankers shall acknowledge to have received funds equal in amount to the deposits on the two thirds scrip issued. May I therefore request the favor of your forwarding such certificate and voucher to this department, with any information on the subject which you may deem useful and satisfactory to the committee.

Yours, etc.,

"R. PONEY, Esq."

"M. SLAUGHTER, Sec'y."

Messrs. Foster, the company's brokers, at the same time applied to the committee for general purposes of the Stock Exchange to fix a settling day. The letter of the 12th of April was considered unsatisfactory, and the committee at first declined to name a settling day; but eventually, after

further communication with Messrs. Foster, a settling day was appointed.

It was admitted that, with the exception of £7,000, the whole of the money was withdrawn from the bankers within a few days after the 12th of April, and that no more than 7,000 shares were ever paid upon. The facts having been discovered by the committee of the Stock Exchange in December, 1853, the name of the company was erased from the list and the shares ceased to be quoted. It was proved that the rules of the Stock Exchange were as stated in Mr. Slaughter's letter. A deposition of the defendant, sworn in the matter of winding up the company, was put in, in which he stated he had given his own check for £3,000 to enable the bankers to give a certificate as to the funds of the company, to be produced to the committee of the Stock Exchange in order to obtain a settling day, and that he got a friend to lend £10,000 for the same purpose. The shares turned out to be valueless.

On this evidence the defendant's counsel objected that there was no evidence to go to the jury; that it appeared that the letter of the 12th of April was considered unsatisfactory by the committee of the Stock Exchange, and was not acted upon, and therefore that the defendant did not make the representation that induced the committee to insert the shares in the list; that the shares purchased by the plaintiff were issued in fraud of the defendant and of the company; and lastly, that the representation not being made by the defendant to the plaintiff himself was not a ground of action. The jury, under the direction of the learned judge, found a verdict for the plaintiff, leave being reserved to the defendant to move to enter a verdict for him.

O'MALLEY, in this term, obtained a rule *nisi* to enter a verdict for the defendant, on the ground that there was no evidence of such a representation as would entitle the plaintiff to recover; that the committee of the Stock Exchange did not act on the representations of the defendant; that a representation made to the committee of the Stock Exchange and not to the plaintiff, or the public, is too remote to ground an action upon; and that with respect to 150 of the shares, they were issued in fraud of the defendant and the company; or why the judgment should not be arrested on the ground that the

connection between the act complained of and the act of the plaintiff by which the loss was sustained does not sufficiently appear.

BOVILL, HOLL and TAYLER showed cause: First, it is said that the plaintiff is not entitled to recover, because the shares were not quoted in the official list in consequence of the representation shown to have been authorized by the defendant, but in consequence of further communications made by the brokers, of the nature of which there was no evidence. But, unless the defendant had caused the false representations to be made, no settling day would have been appointed.

There is no proof that the brokers were guilty of any fraud, and nothing of the kind can be presumed. Many cases show that it is not necessary, in order to constitute a cause of action that the false representation should have been made immediately to the party who acts upon it. It is enough if the false representation is made with the intent that the person to whom it is made shall make it public. *Polhill v. Walter*, 3 B. & Ad. 114 (E. C. L. R. Vol. 23); *Levy v. Langridge*, 4 M. & W. 337, and *Gerhard v. Bates*, 2 E. & B. 476 (E. C. L. R. Vol. 75), are instances of the application of that principle. In *Pilmore v. Hood*, 5 Bing. N. C. 97 (E. C. L. R. Vol. 35), the defendant, being about to sell a public house, falsely represented to B, who had agreed to purchase it, that the receipts were £180 a month. B having told the knowledge of the defendant communicated this representation to the plaintiff, who became the purchaser instead of B, it was held that an action lay against the defendant at the suit of the plaintiff. That case closely resembles the present, because the defendant here by fraud induced the committee of the Stock Exchange to make public a representation which he knew to be false. *Scott v. Dixon*, Q. B. Hil. T. 1859, is an authority in favor of the plaintiff. [BRAMWELL, B.—Another point is, that the shares bought by the plaintiff ought not to have been sold by the parties to whom they were issued, but I do not see how that is material.]

O'MALLEY, in support of the rule.—*Scott v. Dixon*, Q. B. Hil. T. 1859, is distinguishable from the present case, because there the defendant put a written document into the hands of

the brokers to be shown to the persons intending to become purchasers. Here the defendant did not intend that the particular information communicated to the committee of the Stock Exchange should be made public, and in fact it was never published to the plaintiff.

[BRAMWELL, B.—Suppose a lecturer falsely represented that a medical student had attended lectures, and upon such representation the student was examined and got his diploma, would an action lie by a person who afterward employed him? POLLOCK, C. B.—There it is made a condition that students shall not be examined without having attended lectures. The attendance is a *sine qua non*, but not a *causa causans*.]

MARTIN, B.—I am of opinion that the rule must be discharged. I think that the case is concluded, so far as we are concerned, by the proceedings in the Exchequer Chamber in the the case of ¹*Seymour v. Bagshaw*, 18 C. B. 903.

BRAMWELL, B.—I am of the same opinion. The judgment in the Exchequer Chamber, in *Seymour v. Bagshaw*, did not pass *sub silentio*. I consider myself concluded by it. I entirely approve of the case of *Scott v. Dixon*, but I think that this case is distinguishable from it. It would be a strong thing to hold that if a man makes a verbal untrue statement to any person, as, for instance, that the shares in a particular company are a valuable security, if that person buys and recommends his friends to buy, that he is to be liable to any one who buys on the faith of such representation. But it is not a bad rule that a person who makes a fraudulent representation, which is intended to be generally circulated, shall be liable to any person injured by acting upon it, however remote the consequences may be. If the rule is wrong it must be questioned in a court of appeal.

POLLOCK, C. B.—I also think that the rule must be discharged. There was evidence to go to the jury. The defendant acted fraudulently, and made representations to the committee of the Stock Exchange with a view to induce persons to believe the existence of a particular state of things as to these shares.

All persons buying shares on the Stock Exchange must be

¹ A case arising out of the same transaction. 6 M. R. 510.

considered as persons to whom it was contemplated that the representation would be made. I am not prepared to lay down as a general rule that, if a person makes a false representation, every one to whom it is repeated and who acts upon it, may sue him. But it is a different thing where a director of a company procures an artificial and false value to be given to the shares in the company which he professes to offer to the public. Generally, if a false and fraudulent statement is made with a view to deceive the party who is injured by it that affords a ground of action. But I think that there must always be this evidence against the person to be charged, viz., that the plaintiff was one of the persons to whom he contemplated that the representation should be made, or a person whom the defendant ought to have been aware he was injuring or might injure.

If a director of a company, one of the persons who puts the shares forth into the world, deliberately adopts a scheme of falsehood and fraud, the effect of which is, that parties buy the shares in consequence of the falsehood, I should feel no difficulty in saying that in such case an action is maintainable.

Rule discharged.

CLARKE V. DICKSON.

(6 Common Bench, N. S. 453. Common Pleas, 1859.)

¹Liability of director for fraudulent prospectus. An action will lie against a director of a mining company for false and fraudulent representations contained in a prospectus issued with his sanction, although the language might be susceptible of a meaning which would make it not literally untrue; and it is not necessary that the representations should have been made directly by the defendant to the plaintiff. It is enough that they are contained in a document which is meant to be circulated amongst the class of persons who are likely to be deceived by it.

Sole inducement. It is no defense to such an action that the false representations contained in the prospectus were not the sole inducement to the plaintiff to buy shares in the concern.

¹*Jennings v. Broughton*, 17 Beav. 234; 5 De G. M. & G. 126; *Post* PROSPECTUS.

This was an action for false representations in a prospectus of a mining company.

The first count of the declaration stated that the defendant was a promoter and director of a certain company or association of persons having a capital stock divided into shares, and professing to be constituted and managed upon the cost-book principle, and which was called "The Welsh Potosi Lead and Copper Mining Company," and which was formed for the purpose of working certain lead and copper mines situate in the county of Cardigan; and the defendant was interested in and desirous of having the shares of the said company subscribed for and taken, and the amount of such shares paid up; and thereupon the defendant, in order to induce and procure the plaintiff to subscribe for and take certain shares of and in the said company, and to pay up the amount thereof respectively, falsely and fraudulently represented and caused and procured to be represented to the plaintiff, that he, the defendant, and the other directors of the said company, had, on behalf of the said company, given or appropriated, or agreed to give or appropriate, 5,000 paid up shares in the said company, and £5,000 in money, *to the proprietor of the lands and property in and upon which the said mines were situated*, in consideration of his making over to the said company all the right and interest to which he was entitled in the said mines, and the plant, buildings and property thereon or therewith connected; whereas, in truth and in fact, as he, the defendant well knew, he, the defendant, and the said other directors had, on behalf of the said company, given or appropriated, or agreed to give or appropriate, a much smaller sum in money and a much smaller number of shares to such proprietor, in respect of the matters aforesaid, and the residue of the said 5,000 shares and of the said £5,000 in money had been given and appropriated to the defendant and another promoter and director of the said company for their own use and benefit, and without any value or consideration whatsoever.

And the defendant, for the purpose aforesaid, also falsely and fraudulently represented and caused and procured to be represented to the plaintiff, that he, the defendant, and the

other directors of the said company had, on behalf of the said company, made advantageous arrangements for the purchase of the lands and property in and upon which the said mines were situated, and had agreed that five sixths of the purchase money should be received in paid up shares of the said company, and the remainder in cash, and that the price so to be paid was the fair and proper price for the said lands and property, and that the said lands and property were of that value; whereas, in truth and in fact, as he, the defendant, well knew, the persons with whom such arrangements had been made, and from whom the said company were to purchase the said lands and property, were the defendant himself and one of the other directors of the said company, and no other person, and such purchase and all the arrangements made in reference thereto were wholly collusive, and were made and entered into for the private benefit of the defendant and the said other promoter and director, and the said arrangements were extremely disadvantageous to the company, and the price so agreed to be given far exceeded the fair price and true value of the said lands and property.

And the defendant, for the purpose aforesaid, falsely and fraudulently represented, and caused and procured to be represented to the plaintiff, that the said lead and copper mines to be so worked by the said company were the same lead and copper mines which had been described by one William Waller, in a book published by him in the year 1698, and which mines so described by the said William Waller were of very great extent, richness and value; whereas, in truth and in fact, as he, the defendant, well knew, the said lead and copper mines to be worked by the said company were not the same as the said mines described by the said William Waller, and were situate at a considerable distance therefrom, and were of very inferior extent, richness and value to those so described by the said William Waller. And the defendant, for the purposes aforesaid, and in order to induce the plaintiff to believe that the said company was in a thriving condition, and the shares thereof were in demand and of value, also falsely and fraudulently represented, and caused and procured to be represented to the plaintiff, that, out of the five thousand shares in the capital of the said company, which it was proposed to

issue in the first instance, a considerable portion had been already subscribed for and taken, and part of the purchase money paid; whereas, in truth and in fact, as the defendant well knew, a very small portion only of the said five thousand shares had at that time been subscribed for, and no part of the purchase money thereof had at that time been paid. Averment, that the plaintiff, believing and relying on the said representations, was induced to and did subscribe for and take, from time to time, certain shares in the said company, which shares were in fact of no worth or value whatsoever, and become and continue the holder thereof, and pay certain deposits, calls and installments of the purchase money thereof.

The second count stated that the defendant was such promoter and director as in the first count mentioned, and was interested and desirous of having the shares of the said company subscribed for and taken, and the amount thereof paid up; and thereupon, after the making of the representations in the first count mentioned, and after the plaintiff had subscribed for, and while he was the holder of certain shares in the said company and before he had fully paid up the amount of the same, he, the defendant, in order to induce the plaintiff to subscribe for and take certain other shares of and in the said company, and to pay up as well the amount of such other shares as the part remaining unpaid of the amount of the said first-mentioned shares, did, as a director of the said company, fraudulently prepare, present and publish and caused to be prepared, presented and published, for, at and to certain general meetings of the shareholders in the said company, certain false and fraudulent accounts, balance-sheets, reports and statements, whereby it was made to appear to such general meetings that the said company and the affairs and prospects thereof, were in a thriving and flourishing condition, and that dividends of 10 per cent. might and could properly and fairly be declared and paid to the shareholders of the said company, from and out of the profits realized by the said company in and by the working of the said mines during the respective half-years immediately preceding such general meetings, respectively, and sent and caused to be sent such accounts, balance-sheets, reports and statements to the plaintiff, and fraudulently caused to be declared and paid to the plaintiffs and

others dividends out of the funds and moneys of the said company, in respect of their shares in the said company at and after the rate aforesaid; whereas, in truth and in fact, and as he, the defendant, well knew, the said company and the affairs and prospects thereof at the time of the preparing, presenting and publishing of the said accounts, balance-sheets, reports and statements respectively, and the declaration of the said dividends respectively, were in a bad and unsatisfactory condition, and no such dividends ought to have been or could have been declared out of the profits of the said company during the said half-years respectively, and such dividends were not *bona fide* and were, as to all or some of the shareholders in the said company, paid out of the capital moneys of the said company, or by paid-up shares, and not out of the revenue or profits of the said company. Averment, that the plaintiff believing and relying on the said accounts, balance-sheets, reports and statements, and believing the said dividends to be *bona fide*, and to have been really paid out of the profits as aforesaid, was induced to and did subscribe for and take certain other shares of and in the said company, which shares were in fact of no worth or value whatsoever, and pay certain deposits, calls and installments of the purchase money thereof, and also pay certain further calls and installments by and upon the shares previously held by him. And by reason of the premises above mentioned, he, the plaintiff, not only lost all the moneys which he paid upon all the above mentioned shares, and never derived any benefit or advantage therefrom, but was also compelled, by reason of his being the holder of the said shares respectively, to pay certain large sums of money as a contributory, upon the winding up of the said company, for the payment and discharge of the debts and liabilities thereof. Claim, £4,000.

The defendant pleaded—First, not guilty; second, to the first count, that the plaintiff was not induced to, and did not, subscribe for and take the said shares, and become the holder thereof, and pay as therein mentioned, believing and relying on the representations in that count mentioned; third, to the second count, that the plaintiff was not induced to, and did not, subscribe for and take the said shares and pay as in that count is alleged, believing and relying as therein is alleged. Issue thereon.

The cause was tried before CROMPTON, J., at the last summer assizes for the county of Cardigan. The evidence was as follows: The plaintiff was a surgeon and apothecary at Over Darwen; the defendant was a colonel in Her Majesty's service, and one of the directors of a mining company, called The Welsh Potosi Lead and Copper Mining Company. The action was brought to recover compensation for certain alleged false and fraudulent representations contained in a prospectus issued by the directors, whereby the plaintiff was induced to purchase shares which turned out to be valueless, and entailed upon him considerable liabilities as a contributory on the winding up of the concern.

The prospectus, which was issued in September, 1853, was as follows:

"THE WELSH POTOSI LEAD AND COPPER MINING COMPANY,
CARDIGANSHIRE,

"On the Cost-book system, which limits the liability of shareholders. Capital £100,000, in 20,000 shares of £5 each, of which £2 will be payable on or about the 17th of January, 1854, and no further call will be made until the expiration of three months from that date.

"DIRECTORS.

"E. Bates, Esq., Boundary Road, St. John's Wood.

"James Burt, Esq., Briar House, Stoke Newington.

"S. A. Dickson, Esq., Grafton Street, Berkeley Square.

"J. S. Orton, Esq., Upper Hamilton Terrace.

"T. W. Wilkinson, Esq., 26 Gresham Street, London.

"John Williams, Esq., Middleton Place.

"Robert Campbell, Esq., Jermyn Street, St. James's.

"T. Gibbs, Esq., 36 Tavistock Place, Russell Square.

"With power to add to their number."

[Then followed the names of the bankers, solicitors, stock-brokers and auditors.]

"Purser and Manager, T. W. Wilkinson, Esq.,
Offices, 26 Gresham Street, London.

"This company is formed for the purpose of effectually working and developing the Esgair-hir and Esgair-fraith Lead and Copper Mines, commonly known as 'The Welsh Potosi,'

situated midway between Aberystwith and Machynlleth, Cardiganshire, at a distance of nine miles from the shipping port of Aberdovey, where vessels of 300 tons burthen can load along side, and to which there is a good road (the greater portion of which leading from the mines was made a few years back, at a cost of at least £1,000), whereby the company will be enabled to convey the ores to the port at a moderate cost.

"The setts are very extensive being about two miles long and one broad, comprising a territory of mineral ground between 1,400 and 1,500 acres in extent; and the lodes, which are champions, are of very large dimensions, equal in size and strength to any in the principality, and extend upward of one mile in length.

"The property is held for a term of twenty-one years, under a lease granted by Pryse Loveden, Esq., at a royalty of 1-14th, with a covenant for renewal for a further term of twenty-one years at the same royalty.

"These mines are some of the oldest on record, and have been partially worked at various periods, but never properly developed to any depth, as will be seen by referring to the annexed plan of the property.

"Some idea may be formed of their value by a reference to the annexed extracts and small plan taken from a work (in the British Museum) published in 1698, by W. Waller, Esq. (the then steward of these mines), wherein he asserts that 'The great lead vein is 11 feet wide, and $7\frac{1}{2}$ feet in pure ore, and which he had no doubt would increase to 11 feet in ore as it descends'; and, after showing the various workings and expenses of these mines, he goes on to state 'that £40,000 was refused for one moiety.' He also asserts that 'Sir Hugh Middleton was enabled, out of the profits, viz., £2,000 per month, arising from the mines in Cardiganshire, to project and carry out so great an undertaking as the New River from Ware to London,' and that one Mr. Thomas Bushell, by his ingenuity also in working these mines, did amass so large a sum as to be able to clothe the whole of the king's army.'

"A few years since, houses or barracks for about two hundred miners, with counting-house, smith's shop, powder, fuel, and store-houses, and cottage for engine men, were erected

upon the property at a very considerable outlay, and are in a good state of repair, and fit for immediate use.

"The machinery consists of a 40 feet water-wheel, 4 feet breast, working a line of $1\frac{1}{4}$ inch iron rods 600 fathoms long, fitted with iron rollers or wheels fixed to oak bearers, and connected with the principal shafts, in one of which are 20 fathoms of 10-inch pumps, and also 10 fathoms somewhat smaller, reaching to the bottom of the mine; and in the other shaft are 24 fathoms of 10-inch pumps, also two double-horse whims for raising the ore, three pairs of powerful iron crushers, one fluted and two plain, connected with a 22-feet water-wheel, 3 feet breast, with jiggers, dressing-floors and five large reservoirs at a convenient distance for working the above machinery and dressing the ores when raised; thus enabling the company at once to carry on extensive mining operations. The cost of sinking the shafts, driving the levels, forming reservoirs, constructing roads, erecting buildings, and machinery, is estimated as having amounted to not less than £50,000, of which the present company will have the full and immediate benefit. The directors have visited and inspected the mines, and have had the same carefully examined and surveyed by engineers and practical miners of considerable experience, to whose reports they beg to refer; and therefore both as directors and shareholders, have the greatest confidence in recommending this undertaking to the public as a most promising and profitable investment."

[Then followed a report, made by Messrs. Johnson & Son, of their assay of specimens taken from different parts of the mine.]

"The directors have the satisfaction to inform the public that they have made advantageous arrangements for the purchase of the whole of this valuable property, and *have agreed that five sixths of the purchase money shall be received in paid up shares of the company, and the remainder in cash.* (See cost-book rules annexed.)

"The directors have also come to the determination of establishing this company with so large a capital, from the peculiar nature of these mines. The large extent of mineral ground over which they have obtained the right of working, and the very small extent to which any of the lodes have hith-

erto been developed, have induced them to suppose that by the employment of a large capital a better opportunity may be afforded of more fully developing these valuable mines, and obtaining a large return to the shareholders.

"The directors propose, however, in the first instance, to issue 5,000 shares only, to the public; but should further capital be found necessary for the development of the mines, the existing shareholders will have the preference in the issue of shares.

"A considerable portion of the capital has already been subscribed, and a part of the purchase money paid. Active operations have been commenced at the mines; and it is expected that in a month or six weeks the engine shafts will have been pumped free from water, and a considerable quantity of ore raised.

"The directors do not consider it necessary to enter into any calculation of the probable profits which may arise from these mines. The present value of mines in the county of Cardigan is a sufficient evidence of the result which may be expected and amply proved by an inspection of the share list, showing the present value of the shares in such mines as the Lisburne, £18 15s. per share paid; present value, £225; Cwymstwith, £60 paid; present value, £190; East Daren, £28 paid; present value, £105; and Guginan, £8 paid; present value, £20.

"Further information may be obtained, specimens of the minerals inspected, and orders for leave to inspect the mines furnished upon application to T. W. Wilkinson, Esq., the managing director, 26 Gresham Street, London."

The rule referred to was as follows: "That the said 5,000 paid-up shares, together with £5,000 in money, shall be appropriated to the proprietor in consideration of his making over to the company all the right and interest to which he is entitled in 'The Welsh Potosi Lead and Copper Mines,' together with all the valuable plant, machinery, buildings, implements, tramways and other property and articles now in and upon the said mines."

It appeared that the mines in question had some years since been demised by Mr. Pryse Loveden, to one Williamson, who, not finding the speculation successful, in 1847 ceased to

work them. Subsequently the working of the mines was resumed by one Davies, under an arrangement with Williamson, Davies having obtained from Mr. Pryse Loveden a promise to grant a lease to him on the determination of Williamson's interest, in 1861. In the year 1853, one Wilkinson, who had inspected the mines, was desirous of forming a company for the purpose of working them. He accordingly purchased Williamson's interest under the lease, together with the plant, machinery, etc., for £1,000, and Davies' contingent interest for £200 more and an allotment of a small number of shares in the proposed company. Wilkinson also obtained from Mr. Pryse Loveden the promise of a lease of the mines, machinery, etc., on the expiration of Williamson's term, for which, however, he was to pay no premium, but only a royalty. Whilst these arrangements were pending, Colonel Dickson became associated with Wilkinson in the scheme, and advanced the greater part of the money which was paid to Williamson and Davies for their interest in the mines, and Wilkinson and the defendant proceeded to form a company for the purpose of working them, of which company the defendant and Wilkinson were two of the directors, the latter being also purser. An arrangement was afterward made between Wilkinson and Colonel Dickson and the other directors of the proposed company, that the interest which Wilkinson had thus acquired in the mines and the proposed lease from Mr. Pryse Loveden, should be purchased by the company for £5,000 in money and 5,000 paid up shares. This arrangement was carried out, and, pursuant to a previous agreement between them, a moiety of the money and shares was handed over to the defendant. All this occurred before the issuing of the prospectus.

There never was any personal communication between the plaintiff and the defendant; but the former, having seen the prospectus, and relying upon the statements contained therein, *and upon the assurances of his broker, Mr. Lofthouse* (who, it appeared, had been employed by the directors to use his influence in promoting the success of the scheme), *that the speculation was a promising one*, bought a number of shares which, upon the concern proving unsuccessful, became wholly worthless, and entailed upon him considerable liabil-

ity. The plaintiff swore that he would not have bought the shares, but for the statements contained in the prospectus.

On the part of the defendant it was submitted that the action was not maintainable, inasmuch as there was no personal representation of any kind made by the defendant to the plaintiff; and that assuming that the statements contained in the prospectus were untrue, and that the defendant was shown to be an assenting party to its publication, the plaintiff could not recover unless those false statements were the *sole* inducement to the plaintiff's becoming the purchaser of shares. It was also insisted that the statements contained in the prospectus as to the purchase of the mines was perfectly consistent with truth.

The learned judge, in summing up the case to the jury, told them that, if the prospectus was issued to the public with the sanction and assent of the defendant, and contained statements which were false to his knowledge, he was liable to the plaintiff, if acting upon the faith of it, he sustained damage therefrom; that if such false statements in the prospectus were some of the inducements which led the plaintiff to purchase shares in the adventure, the existence of other inducements, such as the broker's recommendation, would not interfere with the plaintiff's right to sue the defendant; that, to render the defendant liable, they must be satisfied that he was guilty of moral fraud in the transaction, that the representations complained of were false to his knowledge, and that the plaintiff sustained damage therefrom; and that it was for them to say in what sense the word "proprietor" was used in the prospectus, and whether it was used in the sense imputed to it in the first count of the declaration.

The jury returned a verdict for the plaintiff, damages, £1,600.

JOHN EVANS, Q. C., in Michaelmas term last, in pursuance of leave reserved to him at the trial, obtained a rule calling upon the plaintiff to show cause why the verdict should not be reduced by the sum of £500, being the price of the shares purchased by the plaintiff from Lofthouse; or for a new trial on the ground that the verdict was against the weight of evi-

dence, "and that the judge misdirected the jury in not telling them that the proof did not support the second supposed fraudulent representation in the declaration mentioned, because there was no evidence whatever that the defendant or anyone else had alleged that the proprietors of the lands and property in and upon which the mines were situate had agreed that part of the purchase money should be received in paid up shares; and also that the judge should have directed the jury, that, as between the plaintiff and defendant there was no personal fraudulent representation made by the latter to the former, and therefore that in point of law the action was not maintainable."

H. ALLEN, F. LLOYD, and G. B. HUGHES, now showed cause. The plaintiff complains of false and fraudulent representation contained in the prospectus issued by the directors of this company (of whom the defendant was one), whereby he was induced to purchase shares which turned out to be worthless. The jury by their verdict have found that those representations were false, and have affirmed the defendant's complicity in the fraud. It is said that there was no evidence of any personal representations made by the defendant to the plaintiff. But that is not necessary; it has been decided in numerous cases that a prospectus is an undetracting to all into whose hands it may come. Thus, in the recent case of *Scott v. Dixon*, 29 Law J., Exch. 62, which was an action against one of the directors of the Liverpool Borough Bank, for the false representations contained in a report published by the bank, Lord Campbell says:

"Reports of joint stock companies, though addressed to the shareholders, are generally meant for the information of all who are likely to have dealings with the company; and I have no doubt that the directors in the present case knew that this particular report would, a few hours after its publication, be in the hands of all the sharebrokers in Liverpool, and that it would be acted on by those who had or wished to have dealings with the bank. But, moreover, we have here the positive evidence that it was to be bought by any person who wished to become a purchaser of shares, and it thus came into the hands of the plaintiffs, and the plaintiffs, by the perusal of it, were induced to buy shares in the bank. I have, therefore,

no doubt whatever that the allegation in the declaration that that representation was made to the plaintiffs is most completely established, and the damages given are no more than the damnification which they have suffered in consequence."

Bedford v. Bagshaw, 29 Law J., Exch. 50, 4 Hurlst. & N. 538, is an authority to the same effect. There, the defendants and others forming the board of management of a joint stock company, for the purpose of getting the shares of the company inserted in the official list of the Stock Exchange, through their secretary, untruly represented that two thirds of the scrip had been paid upon. The shares being, in consequence of that representation, inserted in the official list, the plaintiff, knowing the requirements of the Stock Exchange, on the faith that two thirds of the scrip had been paid upon, purchased shares in the company. The jury having found that the representation was made fraudulently, it was held that the defendant was liable to the damages sustained by the plaintiff although the representation was not made to him directly. POLLOCK, C. B., lays down the rule thus: "Generally speaking, a false and fraudulent statement must be made with a view to deceive the party who makes the complaint, or, at all events, to deceive the class to whom he may be supposed to belong, although he may not be individually and particularly intended. There must always be evidence that the person charged with the false statements and the fraudulent conduct had in his contemplation the individual making the complaint, or, at all events, that the individual making the complaint must have been one of those whom he ought to have been aware he was injuring or might injure by what he was doing." Then, the allegations in the declaration are fully borne out by the statements in the prospectus, respecting the property and the persons from whom it was obtained. If the plaintiff was induced to buy the shares by the representations contained in the prospectus, the mere circumstance of other inducements also in some degree operating upon his mind, can make no difference.

JOHN EVANS, Q. C., GROVE, Q. C., and GIFFORD, in support of the rule. The objection that there was no personal representation by the defendant to the plaintiff is undoubtedly removed by the cases of *Scott v. Dixon* and *Bedford v. Bag-*

shaw. The point as to the misdirection, however, still remains. The material fraud alleged is, that the defendant, in order to induce and procure the plaintiff to subscribe for and take shares, "falsely and fraudulently represented to the plaintiff that he, the defendant, and the other directors of the company had, on behalf of the company, given or appropriated 5,000 paid up shares in the company and £5,000 in money to *the proprietor of the lands and property in and upon which the said mines were situated*, in consideration of his making over to the company all the right and interest to which he was entitled in the said mines, and the plant, buildings and property thereon;" and that "the defendant and the other directors of the company had, on behalf of the company, made advantageous arrangements for the purchase of *the lands and property in and upon which the said mines were situated*, and had agreed that five sixths of the purchase money should be received in paid up shares of the said company, and the remainder in cash, and that the price so to be paid was the fair and proper price for the said lands and property." This is not a correct statement of the representation contained in the prospectus, the word there used being "proprietor" only, not, as in the declaration, "proprietor of the lands and property in and upon which the said mines were situated." Now, Wilkinson was the proprietor of the interest in the mines and plant; therefore, the statement in the prospectus aptly pointed to him, and there was no misrepresentation, or, at all events, none such as that charged in the declaration. The learned judge ought to have told the jury that there was no evidence of the misrepresentation *as to the land*. There was no falsehood at all, if Wilkinson is assumed to be the proprietor. [BYLES, J. The plaintiff was induced to believe that the directors had acquired the property by purchase from the owner of the fee, not from one of their own body. COCKBURN, C. J. Is it likely that the plaintiff would have bought shares if he had known the real facts of the transaction?] The charge against the defendant here is, that he has willfully made, or been party to the making by others, of a false and fraudulent representation, not that he concealed something which it was convenient that the plaintiff should know. Then, as to the evidence. [COCKBURN, C. J. The learned judge who tried

the cause intimates to us that he is not dissatisfied with the verdict.]

COCKBURN, C. J. I am of opinion that this rule must be discharged. Looking to the prospectus issued by the directors of this company, of whom Colonel Dickson was one, it seems to me to be impossible not to come to the conclusion that there was misrepresentation. The prospectus states that "the property is held for a term of twenty-one years under a lease granted by Pryse Loveden, Esq., at a royalty of one fourteenth, with a covenant for renewal." Then, in another part, it is stated, that "the directors have the satisfaction to inform the public that they have made advantageous arrangements for the purchase of the whole of this valuable property, and have agreed that five sixths of the purchase money shall be received in paid up shares of the company, and the remainder in cash."

The effect of that plainly is this, it is a representation to the public that, whereas the property in question was held under a lease, the directors had made arrangements for the purchase thereof from the lessee, who at that time was entitled to the interest in the mine. Now, the lessee of Mr. Pryse Loveden was Mr. Williamson, and he had, in point of fact, made over his interest in the lease to Williamson, whom we find associated with the defendant at the time of the issuing of the prospectus. The sum paid by Wilkinson for Williamson's interest was £1,000, and the price agreed to be paid by the directors who were thus purchasing from two of their own body, was £5,000 in money and 5,000 paid up shares. This, therefore, was an important misrepresentation, first, as to the party from whom the mine was purchased; secondly, as to the amount of the consideration paid for it; and that it was one which was calculated to exercise a material influence upon the minds of persons who became shareholders, is too plain to admit of doubt. That being so, the only question is, whether the declaration sufficiently states the ground of complaint. On the part of the defendant it is said that the fraud charged in the declaration is, that the directors represented that they had agreed to give and appropriate 5,000 paid up shares in the company and £5,000 in money to "the proprietor of the lands, and property in and upon which the said mines were situated, in

consideration of his making over to the company all the right and interest to which he was entitled in the said mines," etc., whereas the prospectus contains no such representations, the word there used being "proprietor" only, which, it is said, means proprietor or person having the interest in the mine, who was Wilkinson. Looking, however, at the whole declaration, it seems to me that the prospectus may fairly admit of the construction there put upon it; it means, the person who then had the interest in the mine, and who was capable of conveying that interest to the company. If so, the matter was properly left to the jury. At all events, it seems clear that this was mere matter of variance, which, if any application had been made to the judge to nonsuit would have been amended, if thought necessary, by striking out the word "lands;" and it is open to us to amend now. The substantial gravamen is, that the plaintiff was induced to take shares by the representation that the property had been purchased at the price mentioned, from the person having the lease of the mine and plant, when in truth the contract which the lessee had he had parted with to one of the directors, for a very insignificant sum. It seems to me that there is no ground for saying that there was any misdirection in omitting to tell the jury that there was no evidence to support the plaintiff's case; and that there is no ground for finding fault with the verdict.

The rest of the court concurring.

Rule discharged.

LEONARD V. PEEPLES.

(30 Georgia, 61. Supreme Court, 1860.)

¹ **Custom not to pay, if mine fails.** Defendant, in action on note for purchase money of a gold mine, offered evidence that the custom in California was that if the mine proved unproductive the note was given up. *Held*, that such custom must not only exist but be known to parties at the time, or so public that knowledge would be inferred; 2, that such custom if it existed was "so unreasonable that it was probably enforced by the bowie knife."

¹ *Babcock v. Case*, 6 M. R. 618.

¹Distinction between fraudulent and innocent misrepresentations.

When one represents as a fact what he knows to be false, or asserts a thing to be so, not knowing whether it be true or not, and it turns out to be false, he is in both of these cases guilty of a moral as well as a legal fraud. But where one honestly believes the truth of what he affirms he is not responsible for the mistake, unless the representations were of a character to amount to a warranty.

DEBT, in Murray Superior Court. Tried before Judge CROOK, July, 1859.

This was an action of debt by Alexander J. Leonard against John H. Peeples, on a promissory note, of which the following is a copy, viz.:

"\$424.87.

One day after date, we, or either of us, promise to pay John A. J. Leonard, or bearer, the sum of four hundred and twenty-four dollars and eighty-seven cents, for value received of him October 1st, 1853.

(Signed.)

JOHN H. PEEPLES,
JOHN W. BAKER,
H. A. JOHNSON."

Defendant pleaded the general issue, and further, that said note was procured by fraud and misrepresentation, in this, that said note was given in part for an interest in a claim in a gold mine in the State of California, sold by plaintiff to defendant and his associates, Baker and Johnson; and that plaintiff represented to defendant and his associates, that if they would purchase said interest they could clear three thousand dollars, and defendant relying on said statement, not knowing anything of the mine himself, bought said interest for \$1,200.00, seven hundred and seventy-five dollars and thirteen cents of which was paid in cash, and the note sued on given for the balance; and defendant avers that said representation was false; that said mine was worth nothing, and that the consideration of said note totally failed, etc.

The testimony being closed, the court charged the jury as follows:

1. Whatever representations were made by plaintiff at the time of the sale, or pending the negotiation, he is bound by, and that they amount in law to a warranty that the thing sold is as represented.

¹ *Lynch's App.* 97 Pa. St. 349.

2. That if plaintiff represented the mine sold to be a good one (he being a miner, and having an opportunity of knowing), and Peebles had not seen and examined it, and these representations were the inducement to purchase, then it is immaterial whether the representations were fraudulently made, or by mistake. The plaintiff must suffer the consequences resulting therefrom.

3. That the testimony of one witness who testifies positively to a fact, outweighs the testimony of many witnesses who testify that they have no knowledge of it.

4. If you shall believe, from the evidence, that the mine was of some value, and that it was equal in value to the amount paid, *in cash*, by defendant, and of no more value, then the plaintiff is not entitled to recover this note—the balance of the purchase money.

Plaintiff's counsel requested the court to charge that if defendant inquired of Freeman (the treasurer of the mine) as to its value, and that if he exhibited his day-books showing their mining operations, and which was true, then the parties negotiated upon equal terms.

This charge the court refused to give, holding that this testimony was introduced for the purpose of showing that defendant did not act upon representations alone, and for no other purpose.

Plaintiff's counsel further requested the court to charge that the sale of a gold mine is peculiar, and that representations concerning them are mere matters of opinion, and did not amount to a warranty that they were as represented.

This charge the court declined to give, but charged that if plaintiff was a miner, and acquainted with the business of mining, and had worked the mine sold, then he is bound by any false representations made by him to defendant as to its value, and clearly so when they are made to one who has neither seen nor examined the mine, and buys upon such representations.

The court further charged that the doctrine of *caveat emptor* does not apply, and that it was not necessary to defendant's support of his plea, or defense, that he should tender back the property purchased.

The jury found for the defendant, whereupon plaintiff moved for a new trial, on the grounds:

1. That the court erred in allowing defendant to prove by witnesses that it was the custom and law, in the mining districts of California, when a mine claim was purchased, and proved or turned out to be unprofitable or worthless, for the vendor to give up the note given for the purchase money.

2. Because the court erred in its charge to the jury, and its refusal to charge as above stated.

3. Because the verdict was contrary to law and the evidence.

The court refused the motion for a new trial, and plaintiff excepted.

J. A. W. JOHNSON, for plaintiff in error.

WALKER, represented by DABNEY,, *contra*.

BY THE COURT—LUMPKIN, J., delivering the opinion.

Leonard sold to Peebles and two others an occupant claim, which he held in the gold diggings of California, for \$1,000. The purchaser paid, say \$575 cash, and gave the note sued on for the balance. This action is brought to collect this note and the defense set up is two-fold—fraud in the contract, and failure of consideration.

There was much testimony read on the trial, and among the rest the court allowed the defendant to prove that according to the law and custom of that country, that whenever a note was given for a gold mine, and it proved unproductive, or did not turn out according to expectation, it was given up, and this is the first error complained of.

California was a State when this transaction took place in the fall of 1853, and no evidence is adduced of any such law at that time, and no such custom was established as to authorize the court below to recognize and act upon it. No proof was offered that Leonard had notice of any such custom, or of the existence of any such custom which was public and uniform and peaceable, so as to infer that this contract was made in reference to it. If there be such a custom, it is so unreasonable that it was probably enforced by the bowie knife.

All the other exceptions grow out of the charges and re-

fusals to charge on the part of the court. As we shall send this case back, we forbear to express any opinion as to the preponderance of the proof.

And before examining each specification in the motion for a new trial I would remark, generally, that the court seems to have labored under this misapprehension that anything said at the time of the trade, whether it amounted to a positive representation or a mere expression of opinion, was a warranty for the breach of which the plaintiff was responsible. Indeed, this is the very language of the first charge which is assigned as error.

"Because the court charged the jury that whatever representations were made by the plaintiff, pending the negotiation, and at the time of the sale, to the defendant, were binding on the plaintiff, and amounted in law to a warranty that the mine sold was of the character it was represented."

All the evidence on the part of plaintiff was to the effect that if the mine proved as productive as it had been, the upper end of it would reimburse the purchaser, and the lower end would be net profit. Surely the opinion thus expressed does not amount that these results would follow.

Another error complained of is this: The court charged the jury that if they should believe from the testimony, that the mine sold was of some value, and that it was equal in value to the amount that the plaintiff had received at the time of the purchase, and no more, that then the plaintiff was not entitled to recover the balance.

This is putting the issue upon value alone, irrespective of fraud or warranty. This can not be the law of the case, or the rule of the plaintiff's rights.

We do not think the court was bound to charge, as law, the first request made by counsel for plaintiff, namely, that "if the defendant inquired of the witness Freeman" (the treasurer of the company) "as to the value of the mine, and the said witness showed him a book of their mining, which was true and correctly kept, that defendant was upon equal terms with the plaintiff."

It will be borne in mind that the parties were fifty miles distant from the mine when the sale was made. The plaintiff had been working it for some time. The defendant had never

seen it. Of course, then, a bare inspection of the book kept by the company, would not itself put the defendant upon an equality with the plaintiff.

We can not sustain the instruction which the court gave the jury, that "the testimony of Freeman, the witness, was admitted for the purpose of showing that the defendant, in making the purchase, did not act solely upon the plaintiff's representations, and that only for that purchase could they consider it."

Mr. Freeman was present at the trade, and his evidence is full as to all that transpired at the time; and his testimony, if credible, establishes that all the plaintiff said was by way of opinion only; and he substantiates the truthfulness of Leonard's representations. His evidence, therefore, was material on many accounts.

We do not think the plaintiff was entitled to the second charge which he asked, that "the sale of gold mines was peculiar, and that representations concerning them are matters of opinion only, and do not amount to a warranty that they are as represented."

This, we apprehend, depends entirely upon the nature of the representations. They may be so positive as to amount to a warranty, and if so, they stand upon the same footing as representations concerning any other species of property.

The second and last charge are very similar. The record is to this effect: That "if the plaintiff represented the mine sold to be a good one (he being a miner and having an opportunity of knowing), and Peeples had not seen and examined it, and these representations were the inducement to purchase, then it is wholly immaterial whether the representations were fraudtently made, or by mistake. The plaintiff must suffer the consequences resulting therefrom."

And the last charge was, that "if the plaintiff was a miner, and had a practical knowledge of the business, and had operated in the mine sold, he was bound by any false representation made by him to Peeples as to the value of the mine, especially as Peeples had not seen nor examined the mine, and bought only upon the faith of such representations."

Much has been written upon the principle of law involved in these charges. This ought to be the doctrine of the courts

upon this subject; when one misrepresents a fact, knowing it to be false, or asserts a thing to be so, not knowing whether it be true or not, and it turns out to be false, he is in both of these cases, guilty of a moral as well as a legal fraud. But where one honestly believes the truth of what he affirms, he is clearly not guilty of moral turpitude, and I should be slow to convict him of legal fraud, so as to subject him to a liability for the mistake, unless the representations were of a character to amount to a warranty. See *Thorn v. Bigland*, 8 Ex. Rep. 731; *Wilde v. Gibson*, 1 H. L. Cases, 605, 603; *Taylor v. Ashton*, 11 M. & W. 407, 415.

If the defendant's witnesses in this case have sworn the truth, the mine did not pay expenses. And yet, after Johnson and Baker had been six weeks at work in the mine, they bought out Mr. Peeples' interest at the price he paid Leonard, and continued to work the mine until they had dug out every foot of it. It will be for another jury who will be more competent to the task than we are, to reconcile this and other portions of the testimony.

¹ PAGE V. PARKER.

(43 New Hampshire, 363. Supreme Court, 1861.)

Joint buyer colluding with vendor—Silent conspirator. Parker who was the owner of a soapstone quarry, conveyed a one third interest therein to Reding for the sole consideration of his procuring a purchaser for the remaining two thirds. Parker and Reding then both made statements to the plaintiff that the quarry was worth \$30,000; was a great bargain at \$.5,000; with specific misrepresentations as to the produce of the quarry, but concealing Parker's position entirely, and that the only consideration for the whole mine was the price to be paid by plaintiff for the two thirds. Plaintiff purchased the two thirds for \$10,000, which was greatly above its value. A brother of Parker was also assisting him in the trade, knowing the conspiracy, receiving \$2,000 of the consideration money, but personally made no misrepresentations. In an action to recover the purchase money it was *held*, that there was sufficient evidence against the brother of Parker to justify the refusal of a nonsuit.

Act of one binds all. The acts and declarations of one of several conspirators are evidence against all.

¹ S. C. on former appeal, 40 N. H. 47. For criminal prosecution on same facts, see *State v. Parker*, 49 N. H. 83.

Fraudulent sale of quarry—Measure of damages. In an action for deceit and fraud in the sale of property, where the purchaser retains it, and where numerous misrepresentations in relation to the property, or in relation to several distinct particulars or qualities of the property are found to have been made by the vendor, some of which may be material and others immaterial, some fraudulently and others honestly made, though all are false in fact, the rule of damages is the difference between the actual value of such property and its value as it would have been if it had been such as it was represented to be in those particulars concerning which the false and fraudulent representations were made.

The price paid the basis of the measure of damages. In such case the price paid is strong, but not conclusive evidence of the value of the property, as it was represented to be, whether such representations were fraudulently or honestly made, provided they were material.

Rule of damages in warranty cases, when applicable. The rule of damages, in cases of warranty and in cases of fraud in the sale of property, is the same—only when the warranty in the one case covers those qualities and properties of the article sold, and those only, concerning which the misrepresentations in the other case are material and fraudulent, as well as false.

This was an action on the case, brought by David Page against David M. Parker, William M. Parker and Henry W. Reding, for conspiring together to cheat and defraud the plaintiff, and defrauding him by selling to him at a price greatly exceeding its value, two thirds of a certain soapstone quarry, in Haverhill, N. H., together with some personal property connected therewith. The first and third counts in the declaration were stricken out before going to the jury. The second count is made a part of this case. A nonsuit was moved as to David M. Parker, on the ground that there was no evidence tending to charge him. The motion was denied, and the defendants excepted.

It was proved that David M. Parker was the owner of the quarry, and the brother of William M. Parker. It was also proved that David M. Parker himself executed the deeds to Reding and Page, and caused them to be deposited with Mr. Felton, in accordance with said agreements; the one to Page being executed October 2, 1856, and the one to Reding being executed October 4, 1856. There was evidence to show that all the material representations set forth in the declaration were made directly by William M. Parker and Reding to Page, and that Reding, although he received a deed of one third of the quarry, and represented himself to Page as a

joint purchaser with him, was, in fact, assisting the Parkers to make a trade, and paying no money for his third; and that Page knew nothing of the real position of Reding in the transaction; representing that the quarry was worth from \$25,000 to \$30,000—a great bargain at \$15,000—but concealing from Page the material fact that they were actually selling the premises at \$10,000.

The case, as transferred, contained a large portion of the testimony in the case, which it is not here necessary to state, except so far as it appears in the opinion of the court.

Upon the evidence, the court charged the jury that to enable the plaintiff to maintain this action, they must find all the defendants to have combined and conspired jointly to defraud the plaintiff in and by the sale to him of the soap-stone quarry; that there was a common design and purpose on their part, and that a positive fraud had been thus committed by the defendants upon the plaintiff, and a damage resulting to himself therefrom. The plaintiff must show, not only that the representations made to him were false, and known at the time to be so, but that they were intended to deceive him, and that he believed and acted upon them as true; that when there is an intentional concealment or suppression of material facts, in the making of a contract in cases in which both parties have not equal access to the means of information, it will be deemed unfair dealing, and will vitiate the contract. The law requires truth and good faith in dealings among men, and these forbid a false representation, made knowingly, or the fraudulent concealment of material facts exclusively known to the party who conceals them. But when both parties know, or with ordinary care might discover the facts, and there be no misrepresentation or warranty, the buyer is his own insurer, and the law will give him no remedy.

The defendants requested the court to instruct the jury that if they believed that Reding made no representation intentionally false, except in respect to what he was to pay for the property, and in respect to how he was to obtain the means of payment, and that there was no fraudulent concealment on his part, except as to what he was to pay, and in respect to how he should obtain the means of payment, the jury should find him not guilty. The court declined to do this, instruct-

ing the jury that they should find him guilty or otherwise, upon considering and weighing all the evidence in the case, and upon the principles of law before suggested.

2. The defendants' counsel requested the court to instruct the jury that if they believed the defendants to have made false and fraudulent representations to the plaintiff, in respect to only one material matter affecting the value of the property sold, the jury should assess damages only in respect to that one matter; and thereupon the plaintiff's counsel requested the court to instruct the jury that if they found that the defendants conspired and agreed together to cheat and defraud the plaintiff, and made any material representation to the plaintiff that was false, fraudulent, and made for the purpose of carrying out said conspiracy, then the jury would be justified in finding the defendants guilty.

The court, however, referring to the rule of damages as adjudged in this case at a former trial, gave it as their guide in the present case, that when the purchaser retained the property, if the jury found for the plaintiff they might assess in his favor, as damages, the difference between the actual value of the property purchased and its value as represented to be at the time of the sale, the price paid being very strong, but not absolutely conclusive evidence of the value of the property as it was represented to be. Upon the subject of damages, the court declined to instruct otherwise than as above stated.

The jury having returned against the defendants their verdict for the sum of \$10,800.72, the defendants moved to set the same aside, and for a new trial for the causes assigned. They also moved in arrest of judgment on account of the insufficiency of the plaintiff's declaration, and the questions of law were reserved.

HIBBARD and C. W. & E. D. RAND and PAGE, for the plaintiff.

WOODS & BINGHAMS, for Parkers, defendants.

FELTON, for Reding, defendant.

SARGENT, J.

The motion for a nonsuit as to David M. Parker, in this case, was properly denied. It had been proved that he was the owner of the quarry, and the brother of William M., and that David himself executed the deeds to Reding and Page, and caused them to be deposited with Mr. Felton, in accordance with the arrangement of William M., who had acted as the ostensible agent of David, and that all the material representations set forth in the declaration were made directly by William M. and Reding to Page; Reding concealing his true position and relations to the transaction from Page. In connection with this evidence, it is only necessary to refer to the testimony of William M. Parker to be satisfied that there was some evidence tending to show that David was connected with and interested in the conspiracy and fraud by which the plaintiff suffered, if any such conspiracy existed, or any such fraud was perpetrated, and if there was any evidence tending to prove that fact in the case, competent to be submitted to the jury, then the motion for a nonsuit as to him could not prevail.

William M. Parker testified that he learned part of his information from his brother, etc.: "I told my brother that Reding was going to take one third and Page two thirds of the purchase. He knew that Reding was to pay nothing except his services, some bills, and personal expenses for going to the quarry. Everything between my brother and Reding was understood, and that he was to be interested on favorable terms. My brother got sick of the quarry in June, 1856. He gave me entire control over the affair, by power of attorney. I knew my brother was ready to verify everything I had been representing, etc. My brother knew substantially what passed between us; he knew the main facts. If it proved a bad operation, I understood my brother would consent to have the notes extinguished. My brother allowed me to write what I was a mind to. The notes were under his control. He allowed me to do pretty much as I had a mind to. I never had any legal right to the money. The money went into a common purse. My brother had about \$2,000, and I had the balance."

This, taken in connection with the fact that David M. Parker was a witness upon the stand, and did not deny the con-

spiracy, and in connection with the other testimony in the case, would seem to leave no doubt about the correctness of this ruling. The jury may have found, from all the evidence, that David M. Parker knew all, and assented to all, and participated in all that was done, and was the originator and instigator of the whole plan, whose execution was intrusted to other hands.

The instructions in regard to what the jury must find, in order to charge all the defendants, are not objected to. They would seem to be full and sufficient. The remarks that were made by the court in regard to the general principles on which parties should proceed in making contracts, were not very material to this case, and are not important to be considered.

The instructions that were requested in relation to Reding were properly withheld. It is argued that the misrepresentations that he admits he made to, and the facts which he admits he concealed from Page, were not material in the case, and were not set forth in the plaintiff's declaration, nor relied on by him at all in making out his case. That may all be true and yet the ruling be correct. If the jury found that Reding, with the other two, had combined and conspired to effect a common object, and it was arranged that each should do certain acts and perform certain parts, with a view to the attainment of the same common result, or that one or two were to be the active agents, while the other one or two remained in the background, and took no open and visible part in the transactions, yet they would all be alike responsible for the acts of all and of either one. Whatever is done or said by either one of the number in furtherance of the common design becomes a part of the *res gesta*, and is the act or saying of all.

In this view, it would make no difference whether Reding did anything himself, provided he was a member of the combination or conspiracy, so as to become responsible for the acts of the others. But it is argued by counsel that, if there was no fraudulent concealment on the part of Reding, he could not have been a member of the combination to defraud Page, because, if he was such a member of the conspiracy and did not communicate it to Page, that, of itself, was a fraudulent

concealment. But that was not the way the instructions were understood, or would ever be understood in that connection.

The terms, fraudulent representations, and fraudulent concealments, in the sale of an article, refer, ordinarily, to the communications made between the parties in regard to the qualities of the article whether good or bad. The fraudulent representation is some recommendation of the article or statement in regard to its good qualities, which is known to be untrue; and the fraudulent concealment is the intentionally omitting to disclose some bad quality, or some fact in relation to the property known to the vendor and unknown to the purchaser, which it is material that the latter should know, to prevent being defrauded.

This was the kind of concealment referred to in the instructions requested. They were so understood, and would be always, we have no doubt; and if any concealed meaning was covered in these instructions, not apparent on their face, no benefit should be received from it. When instructions are desired, they should be plainly and fully stated. If counsel intended, by these instructions which they asked, what they now suggest that they did, it was their plain duty to have put them in a clear and tangible form, and to have requested the court to instruct the jury that, if they found that Reding was not a party to any combination or conspiracy to defraud Page, and that he made no representations intentionally false, except, etc., they should have found him not guilty; then they would have been understood. But such instructions would not, of course, be asked for, because they had already been substantially given, or if not they would have been, without hesitation. But no such interpretation can fairly be given to the instructions desired.

The plaintiff's counsel requested the court to instruct the jury that, if they found that the defendants conspired and agreed together to cheat and defraud the plaintiff, and made any material representation to the plaintiff that was false and fraudulent, and made for the purpose of carrying out said conspiracy, that the jury would be justified in finding the defendants guilty.

We understand, from the case, that these instructions were

not given; and, in the terms in which they were requested, they were properly withheld, and could not properly have been given. They leave out altogether one of the main elements upon which the jury could find for the plaintiff at all; that is, that the plaintiff credited said representation, acted upon it, and was, in consequence, damaged. Without these qualifications they should have been withheld, as we understand they were; but, with these qualifications added, they would have been proper, and would, undoubtedly, have been given.

The rule of damages, as given to the jury by the court in this case, taken in connection with the instructions requested by the defendant, have required and received a careful examination.

It is not every false affirmation of the vendor of property that will give the vendee an action, even though he may be deceived by it. If the buyer trusts to representations which were not calculated to impose upon a man of ordinary prudence, or if he neglects the means of information easily within his reach, it is better that he should suffer the consequences of his own folly than to give him an action against the seller: *Sudg. Vend.* 2, 3; *Bowring v. Stevens*, 2 C. & P. 337.

No action will lie for a false representation by the vendor concerning the value of the thing sold, it being deemed the folly of the purchaser to credit the assertion, and besides, value is a matter of judgment and estimation about which men may differ. Nor will an action lie for a false affirmation that a person bid a particular sum for the estate although the vendee was thereby induced to purchase, and was deceived as to the value. And so of other cases where the purchaser might, by the exercise of common prudence, have ascertained the truth and saved himself from injury: *Harvey v. Young*, *Yelv.* 21; *Bailey v. Merrill*, *Cro. Jac.* 386; *Davis v. Meeker*, 5 *Johns.* 354; *Fenton v. Browne*, 14 *Ves.* 145; *Van Epps v. Harrison*, 5 *Hill*, 63.

In such cases the false affirmation, though knowingly and intentionally made, is not enough. The vendee must go further and show that some deceit was practiced for the purpose of putting him off his guard: *Van Epps v. Harrison*, before cited; *Davis v. King*, 1 *Stark.* 75. Though a distinction

has been made between a general affirmation as to the value of the thing sold, and a false statement that the property was rented for £42 per annum when the rent was much less than that, whereby the plaintiff was deceived and induced to pay a high price for the property: *Elkins v. Kesham*, 1 Lev. 102; *Lysney v. Selby*, 2 Lord Raym. 1118; *Lysney v. Selby*, 1 Salk. 214; *Dobell v. Stevens*, 3 B. & C. 623; *Bourring v. Stevens*, 2 C. & P. 337. And for the reason as stated by GOULD, J., in *Lysney v. Selby*, that "the value of the rents was a hard thing to be known and secret, known to none but the landlord and the tenants and they might be in confederacy together." And it was held in *Van Epps v. Harrison*, before cited, that a fraudulent representation that a piece of property cost the vendor \$32,000, when in fact, it cost him but \$16,000, furnished a good ground of action. BRONSON, J., dissenting and holding that the statement of what the property cost was but another mode of asserting that the property was of that value, which latter representation is not actionable though false. But we think the holding of the court was right in that case.

Again, not every false representation, though material, and though acted on by the purchaser to his damage, is actionable in this form of action. Where there is a warranty, and the purchaser acts upon it, and the article proves to be defective in some quality covered by the warranty, the purchaser has his action. And it makes no difference whether the vendor knew of the defect or did not know of it; he must make his warranty good. But in an action for deceit in the sale of property, it is not only necessary that the misrepresentation be false, but it must also be fraudulent, in order to be actionable. There may be many misrepresentations made, all of which are false in fact, a part of which are fraudulent, and a part ignorantly, but honestly made. In this form of action no damages can be recovered for the latter class of misrepresentations, however much the purchaser may have been influenced and damaged by them. The fraud being the gist of this action, it is only those misrepresentations that were material and fraudulently made that can be actionable here.

No fault is found with the instructions given in regard to these matters. The court instructed the jury not only that

they must find that the conspiracy was entered into, etc., but "that a positive fraud had been thus committed by the defendants upon the plaintiff, and a damage resulting to him therefrom; that the plaintiff must show not only that the representations made to him were false, and known to them at the time to be so, but that they were intended to deceive him, and that he believed and acted upon them as true; that when both parties knew, or, with ordinary care, might discover the facts, and there be no misrepresentation or warranty, the buyer is his own insurer, and the law will give him no remedy." These instructions seem to be correct, so far as they go, and are sufficient on the point of materiality of the misrepresentation, and the necessity of its being fraudulent as well as false, in order to be actionable here: 40 N. H. 69.

Upon the former trial of this case, at the trial term, the court instructed the jury that the measure of damages, if they found for the plaintiff, "was the difference in the value of the property as it actually was, and its value as it would have been if it were such as it was represented to be, in those particulars in relation to which the false and fraudulent representations were made, on which the verdict was founded." 40 N. H. 58. And these instructions are held to be substantially correct, in the opinion formerly delivered in this case, with the qualification that the price paid should be taken as very strong though not absolutely conclusive evidence of the value of the property as it was represented to be. This qualification seemed necessary, else the damages might often be much larger than the whole amount of the purchase money, and the purchaser keep the property besides. Let us suppose that in a given case the representations should be that the stone from a certain quarry was worth \$20 per ton, and would bring that price in the market; that \$10 per ton would cover all expenses of working, quarrying and transporting the same to market; that the quarry was extensive enough so that one hundred men could work to advantage upon it all the time, and that they could get out eight and one third tons of the stone per month, each man; that the supply was sufficient to last, when worked at that rate, ten years, without extra expense of working, and that the demand would and must necessarily keep in advance of the supply for that length of time.

These being the representations, suppose the purchaser, relying upon them all, and equally upon each, makes the purchase at \$50,000, and it proves that all these representations are false and fraudulent in every particular, and that the quarry is perfectly worthless; and now the purchaser, having paid his money for the quarry, brings his suit for damages. By what rule shall his damages be assessed? Shall he recover the difference between the value of the quarry as it was represented to be by the vendor, and its actual value?

Its value, as represented, could be seen by a brief calculation: Eight and one third tons per month is 100 tons per year for each man. This multiplied by 100, the number of men, gives 10,000 tons per year. This multiplied by 10 the number of dollars of net profit per ton, gives \$100,000 per year; and this, for ten years, gives \$1,000,000. As represented, it was worth that amount. It is actually worth nothing. The damages can not be the difference between the value as represented and the actual value, as the plaintiff has paid but \$50,000.

It is evident that, although the plaintiff trusted somewhat to all the representations made, yet he did not do so to the full extent. He trusts so far to the representations that he concludes to pay his \$50,000 for the quarry, and that is all he has been damaged. Hence the necessity of making the price paid strong evidence of the value as represented to be. In other words, it is the value which the purchaser was induced to put upon the property in consequence of the fraudulent representations made to him; the amount which, by these misrepresentations, he was induced to pay for what has proved to be worthless.

The court, in the former decision, wishing to make this qualification in the instructions of the court at the first trial, did not, by any means, intend to leave out of view the other qualification which was there included, and which is quite as necessary, in a large class of cases, to be observed as any other. The statement of the rule of damages, as stated by the judge who delivered the former opinion in this case, is correct only in connection with the instructions that were given on the first trial in the court below, as appeared in the case, and which instructions are there said to be substantially correct.

The rule of damages as stated in the former opinion in this case, without the qualification that had been affixed at the first trial below, is said to be the rule in ordinary cases, or "under ordinary circumstances:" 40 N. H. 72. The same rule had been substantially laid down before in *Fisk v. Hicks*, 31 N. H. 535, and numerous cases cited, and has been since repeated in *Carr v. Moore*, 41 N. H. 131, and is found in *Stiles v. White*, 11 Met. 356. This rule as stated is correct in a class, and in much the larger class, of cases as will be seen by examining the cases cited. Where there is but a single fraudulent misrepresentation, or upon only a single point, or in relation to a single quality or circumstance, there this rule applies and needs no qualification, except that the price paid is to be evidence of the value as represented to be. And in that class of cases, too, the same rule applies in cases of warranty as in actions for deceit and fraud, as is said in *Stiles v. White*, because the defendant can not claim a more favorable rule of damages on the ground of his own fraud, in an action of deceit, than he would be entitled to upon his promise in a case of warranty; in other words, that less damages were not to be recovered in an action *ex delicto*, than in an action *ex contractu* for the same subject-matter.

Take the case of a horse, warranted sound and proving unsound—then the rule of damages, as stated in 40 N. H. 72, is correct; and it would be equally so, in case the horse were represented sound when known to be otherwise, in an action for deceit and fraud in the sale. But take a case where there are many misrepresentations charged, some of which may be fraudulent and others not so, though all may be false in fact and have deceived the plaintiff, and then the rule as there stated is not correct, without the further qualification, which was given at the first trial, that the rule of damages was the difference between the real value and the value as it was represented to be in those particulars, in relation to which the false and fraudulent representations were made, on which the verdict was founded. And with that qualification the rule will be the same in cases of warranty and deceit and will be a general rule that may be applied in all cases.

Now, suppose the plaintiff paid \$11,000 for a piece of

property really worth only one thousand; and we will suppose that there were misrepresentations made in regard to the quality of this property in ten different and distinct particulars, all of which were material, and each affected the value of the property equally with every other, and each influenced the purchaser equally in buying property. Now if all these misrepresentations were not only falsely but fraudulently made, then the plaintiff should recover as damages, in an action for deceit and fraud in the sale, \$10,000, just the same as he would have been entitled to had the action been upon a warranty in all these ten particulars.

But suppose that these misrepresentations should be found by the jury to have been made fraudulently only in relation to five qualities or particulars, and ignorantly and honestly in regard to the other five particulars. Then in this action the plaintiff could recover only \$5,000, whereas in a warranty upon all the ten particulars, he could recover \$10,000. The rule of damages in the two cases is the same only when the warranty covers the same ground, and no more, that the representations in the other case do, which are both false and fraudulent and material; and that is as far as the authorities go. A man can not complain that he is held to the same rule of damages in case he fraudulently misrepresents a certain quality of the article sold, that would apply if he had warranted the article in that same particular in regard to which the false and fraudulent representation was made.

In the case before us there were many misrepresentations alleged, and all were alleged to be false and fraudulent. Now, if the jury had found that all these misrepresentations were material and also false and fraudulent, then the rule as given would have been correct. But suppose they found that three of the alleged misrepresentations were upon matters immaterial, that three others were made honestly, though they proved to be false in fact. Then all that the plaintiff could have recovered would be the damages he had suffered in consequence of the four remaining misrepresentations that were material and fraudulent, as well as false. And so if the jury had found that the defendants made false and fraudulent representations to the plaintiff in respect to only one material matter affecting the value of the property sold, they should

have assessed damages only in relation to that one matter, which would have been in accordance with the instructions asked for by the defendants.

But these instructions, or any others covering the same ground, were not given, but were refused, and the rule of damages given to the jury was the difference between the real value and the value as represented to be, etc., and no distinction was made between representations on material or immaterial matters, or misrepresentations fraudulently or honestly made.

Although as we have seen, proper directions had been given as to what it was necessary to prove in order to make the defendants liable to any damages, yet the rule for the assessment of damages was not properly qualified and defined, and taking the instructions given in connection with those refused, the jury could hardly have failed to assess damages for all the misrepresentations made, whether material or otherwise, and whether honestly or fraudulently made.

The instructions given at the first trial, that the measure of damages was the difference in the value of the property as it actually was, and its value as it would have been if it were such as it was represented to be in those particulars in relation to which the false and fraudulent representations were made, on which the verdict was founded, were substantially correct, so far as they went, and the qualifications in relation to the price paid being evidence of the value of the property as it was represented to be, which was added in the former opinion in this case, needs qualifying as there stated, because we have seen that no damage is recoverable for any misrepresentations upon immaterial matters, however false. The price paid, therefore, must be evidence of the value of the property as it was represented to be in those particulars only in which the representations were material, whether honestly or fraudulently made.

The motion in arrest of judgment must be overruled, as we see no reason why the present declaration is not sufficient.

Verdict set aside; new trial granted.

GIFFORD V. CARVILL.

(29 California, 589. Supreme Court, 1866.)

Items inducing value not matters of mere opinion. Statements going to the value of a mine as to quantity of ore on hand, and its proximity to wood and water for milling facilities, are not mere matters of opinion upon which a purchaser of stock has no right to rely.

Defense to purchase money note. Such representations, if fraudulent, on proper pleadings may be given in evidence to defeat notes given in consideration of stock purchased on such representations.

¹ **Rescission essential before defense available.** A party can not interpose such defense unless he has, before trial and promptly after discovering the fraud, offered to rescind and return all property received from the defrauding party, unless the property received be of no value whatever.

² **No tender necessary if stock absolutely without value.** If the property have any value whatever to either party it must be returned, but if entirely worthless to both parties return would be a useless ceremony.

Stock of value—Mine of no value. The finding that a mine of a mining corporation has no value does not necessarily and of itself imply that the shares of the company have no value; they may have other property or paid up capital on hand.

Plea of fraud and rescission. Defendant in suit on note given for stock sold on fraudulent representations should aver rescission, or else aver that the property received by him had absolutely no value.

Appeal from the District Court, Fourth Judicial District, City and County of San Francisco.

The notes in suit were given in part payment for twenty-five shares of the stock of the Amargoza Mining Company, situated in the southern part of California. The defendant had never visited the mine, and the purchase was made in San Francisco.

On the trial the defendant introduced evidence tending to prove that the plaintiff, as an inducement for the defendant to purchase, told him he had just come from the mine, and that there were five hundred tons of ore out of the mine, which assayed as high as nine hundred dollars per ton, and that there was plenty of wood, lumber, and water near the mine to run a steam mill. The defendant also introduced evidence tending to prove that there was at the time only about twenty-five tons of ore out of the mine, which assayed

¹ *Grant v. Law*, 3 M. R. 80.² *Babcock v. Case*, 6 M. R. 618.

only five dollars per ton, and that the mine was in a desert, with no wood or water near it, and was valueless, and had since been abandoned.

The defendant recovered judgment, and the plaintiff moved for a new trial, and assigned as one of his grounds that the evidence was insufficient to justify the verdict, in this, that the matters sought to be proved were matters of opinion, as to which the defendant had no right to rely on the statements of the plaintiff.

The court denied a new trial, and plaintiff appealed.

The other facts are stated in the opinion of the court.

BROOKS & WHITNEY, for appellant, argued that the matters which the defendant sought to prove were: first—matters of opinion, or, second—of information, as to which the defendant had no right to rely upon the statement of the plaintiff, and cited Chitty on Contracts, 397, 398. They also insisted that the matter of the answer, if true in point of fact, constituted no defense, because the defendant did not in fact rescind the contract, and cited *Conner v. Henderson*, 15 Mass. 319; *Kimball v. Cunningham*, 4 Id. 502; *Perley v. Balch*, 23 Pick. 283; *Hyatt v. Boyle*, 5 Gill & J. 121; *Taymen v. Mitchell*, 1 Md. Ch. Dec. 496; *Marston v. Knight*, 29 Me. 341; 2 Kent, 480, and notes; *Kase v. John*, 10 Watts. 109; *Voorhees v. Earl*, 2 Hill, 288; *Lightburn v. Cooper*, 1 Dana, 273; *Cary v. Gruman*, 4 Hill, 626; *Thornton v. Wynn*, 12 Wheat. 193; *Allen v. Anderson*, 3 Humph. 581; *West v. Cutting*, 19 Vt. 536; *Grimaldi v. White*, 4 Esp. 95; *Basten v. Butter*, 7 East, 479; *Gronning v. Mendham*, 1 Stark. 257; *Hopkins v. Appeltry*, 1 Id. 477; *Milner v. Tucker*, 1 C. & P. 15; *Percival v. Blake*, 2 Id. 514; *Cash v. Giles*, 3 Id. 407; *Fisher v. Samuda*, 1 Camp. 190; *Boorman v. Jenkins*, 12 Wend. 566; *Lawrence v. Taylor*, 5 Johns. 107.

SHARP & LLOYD and T. I. BERGEN, for respondent, contended that, under the facts of this case, the purchaser had a right to rely on the representations of the seller, and if those representations were false it was a fraud and a good defense; that it was not a case where the seller merely represented what he himself believed as to the value of the articles, and

left the determination to the judgment of the buyer, and cited 2 Kent, 486; *Dogget v. Emerson*, 3 Story, 733; *Daniel v. Mitchell*, 1 Id. 172; *Small v. Atwood*, 1 Young, 407, 459; *Stone v. Denny*, 4 Metc. 161; *Buford v. Caldwell*, 3 Mo. 477; *Thomas v. McCann*, 4 B. Mon. 601; *Parham v. Randolph*, 4 How. Miss. 435; *Daniel v. Mitchell*, 1 Story, 190; *Mason v. Crosby*, 1 Wood. & M. 852, *et seq.*; *Farren v. Daniels*, Id. 100; *Foster v. Swasey*, 2 Id. 222; *Smith v. Babcock*, Id. 254; *Tuthill v. Babcock*, Id. 299; *Shaeffer v. Sleade*, 7 Blackf. 178; *Rench v. Sheldon*, 14 Barb. 66; *Hill v. Gray*, 1 Stark. 434; and *Smith v. Richards*, 13 Pet. 26. They also contended that the court might allow the defendant to return the stock even after the trial, and cited *Willis v. Bradley*, 1 Sandf. 560; *Ladd v. Moore*, 3 Id. 689; *Nichols v. Michael*, 23 N. Y. 264; *Fruschieres v. Henriques*, 23 Barb. 270; *Pequeno v. Taylor*, 38 Id. 388; *Thurston v. Blanchard*, 1 Metc. 557.

By the COURT, SAWYER, J.

This is an action upon two promissory notes given for a part of the purchase money for shares of stock in a mining company. The defense is that the defendant was induced to purchase by the false and fraudulent representations of the plaintiff as to the value of the mines owned by the company issuing the stock. There is no averment in the answer, and no proof or finding of the court that defendant notified the plaintiff of his intention to rescind the contract on the ground of the fraud, or that he offered to return the stock. On the contrary, it appears that this defect was made one of the grounds for a new trial, and the court required the defendant to deposit the stock with the clerk for the benefit of the plaintiff as a condition of denying the motion.

We do not think the matters which the defendant sought to prove, as they are presented by the record, were mere matters of opinion or information, as to which the defendant had no right to rely upon the statements of the plaintiff: *Smith v. Richards*, 13 Pet. 26; *Bennett v. Judson*, 21 N. Y. 239.

Fraudulent sale of mining stock and rescission of contract.

Appellant insists that, although the matters alleged and

claimed to have been proved, might, if true, have justified the defendant in rescinding the contract and returning the stock, yet, until such rescinding and return, they constituted no defense to an action on the note; and such is the general rule upon the subject. In *Herrin v. Libbey*, 36 Me. 357, the rule is expressed in the following language, viz.: "The rights of a party who has been defrauded in making a contract are, on the discovery of the fraud, *within a reasonable time*, to rescind the contract and restore the parties to their former condition, or to affirm the contract and claim compensation or damages for the injury he has sustained by reason of the fraud." In *Burton v. Stewart*, 3 Wend. 239, the court say: "Had they intended to treat the contract as void, on the ground of fraud, it was their duty when they discovered that the mare was not such as the plaintiff had represented her to be, to have returned her to the plaintiff; when prosecuted on the note, and the cause brought to trial it was too late to repudiate the contract." See also *Kimball v. Cunningham*, 4 Mass. 502; *Norton v. Young*, 3 Greenl. 32; *Campbell v. Fleming*, 1 Adol. & El. 40. These authorities state the rule correctly in all cases where the property purchased is of the slightest value to anybody. When the article is absolutely valueless for any purpose, it is not necessary to return it. This is on the ground that an article absolutely without any value is not the subject of a contract; that it can not afford any consideration for a promise, and the contract is *nudum pactum*, absolutely void, *ab initio*, for want of a consideration to support it. But it is not enough that it shall be without value to the defendant. If it *is*, or *may be* of *any* value to *either* party, or if the detention would produce any loss or injury to the other party, the contract must be rescinded, and the property returned within a reasonable time after the discovery of the fraud. The editor of the last edition of Greenleaf's Reports in a note to *Norton v. Young* 3 Greenl. 33, thus states the rule, and cites a number of authorities to sustain it. In *Conner v. Henderson*, 15 Mass. 321, the property sold consisted of a number of casks of lime, the lime proving to be worthless. The court say (p. 322): "Although the principal subject of the contract in the present case, may be presumed, from the evidence reported, to

have been absolutely of no value, and so the returning of it would have been but an idle act, yet the casks were of some value, and should have been restored, if the plaintiff would treat the sale as a nullity and demand his money as paid without consideration." So also in *Perley v. Balch*, 23 Pick. 285, the court say: "Where the purchaser is induced, by the fraudulent misrepresentations of the seller, to make the purchase, he may, within a reasonable time, by restoring the seller to the situation he was in before the sale, rescind the contract and recover back the consideration paid, or if he has given a note, resist the payment of it. Here was no return of the property purchased; but if that property was of no value, whether there was any fraud or not the note would be *nudum pactum*. The defendant's counsel not controverting the general rule, objects to the qualification of it. He says that the ox, though valueless to the defendant, might be of value to the plaintiff, and so the defendant would be bound by his contract although he acquired nothing by it. But a damage to the promisee is as good a consideration as a benefit to the promisor. If a chattel be of no value to any one, it can not be the basis of a bargain; but if it be of any value to either party, it may be a good consideration for a promise. If it is beneficial to the purchaser, he certainly ought to pay for it. If it be a loss to the seller, he is entitled to remuneration for his loss. But it is apparent that a want of consideration was not the principal ground of defense. The defendant mainly relied upon fraud or a warranty; and to render either available, to avoid the note, it was indispensable that the property should be returned. He can not rescind the contract and yet retain any portion of the consideration. The only exception is where the property is entirely worthless to both parties. In such case, the return would be a useless ceremony, which the law never requires. The purchaser can not derive any benefit from the purchase and yet rescind the contract. It must be nullified *in toto* or not at all. It can not be enforced in part and rescinded in part; and if the property would be of any benefit to the seller, he is equally bound to return it. He who would rescind a contract must put the other party in as good a situation as he was before,

otherwise he can not do it: *Chitty on Cont.* 276; *Hunt v. Silk*, 5 East, 449; *Conner v. Henderson*, 5 Mass. 314." (See also *Shepherd v. Temple*, 3 N. H. 457; *Carter v. Walker*, 2 Rich. 40; *Christy v. Cummins*, 3 McLean, 386; *Chitty on Cont.*, pages 402, 636, 665 and notes.) Thus it will be seen that the safe course to pursue for a party who has been induced by fraudulent representations to make a purchase which he otherwise would not have done, is, when the fraud is discovered, to at once repudiate the contract and return the things purchased.

*Return of property after trial is not in time to obtain rescission of contract.*¹

If it was necessary to rescind the contract and return the property in this case, a surrender of the stock to be delivered to the plaintiff made after verdict and judgment, upon requirement of the court as a condition of denying a new trial, was not in time. The cases cited by respondent on this point are of a different class and not applicable, or, strictly speaking, are not within the rule. They are cases where a party, upon fraudulent representation as to his pecuniary condition, has induced other parties to sell him goods on credit, giving his own note therefor. The vendor in such cases, upon discovering the fraud, may bring trover or replevin without first surrendering the note. But he must be prepared to surrender it on the trial. Of course in that class of cases no loss can result to the defendant from retaining his own note till the trial. But where the vendee gives the note of a third party upon a fraudulent representation as to the responsibility of the maker, the vendor must return the note to the vendee before suing, for the delay may result in injury to the vendee. This distinction is stated and authorities referred to in the note before cited: 3 Greenl. 33, note.

To apply these principles to the present case. There is no averment in the answer, and no evidence, that defendant rescinded the contract and returned or made a tender of the stock, and no averment that it was of no value, unless the averment that it was "of little or no value" can be so construed. If it was not absolutely without value to either party, if it had

¹ *Byard v. Holmes*.

a little value, there was a consideration which, being actually retained, did not afterward fail, and it was necessary to rescind the contract and return the consideration within a reasonable time after the discovery of the fraud. We are inclined to think the allegation can not be regarded as an averment that there was no value. It must be construed most strongly against the pleader, and the implication is that it might have been of some, though little value. At all events the answer does not squarely negative the idea that the stock was of some value.

It is true that the court, upon the evidence (which however, was admitted under objection that it was inadmissible under the pleadings) found that the *mine* of the company "was of no value whatever," but there is no finding as to whether the "*shares of mining stock* in the Amargoza Mining Company," which formed the consideration of the note, were valueless or otherwise. The value of the mine referred to may have been the main inducement to purchase, and the defendant may have been entitled to rescind the contract in consequence of fraudulent representations in regard to its value, yet it by no means follows that the stock of the company owning the mine was utterly valueless because *that particular mine* was so, and the burden of alleging and showing that the stock was valueless rested on the defendant. The company may, for aught that appears to the contrary, have had other property, or a paid up capital sufficient to have still made the stock of some value. As there was no averment that the stock had no value, there was strictly no issue tendered on that point, and although there is no exception for want of a finding, the court can not be presumed to have found on such issue. The cause appears to us to have been somewhat loosely tried on both sides, and not with a clear view of the distinction made by the authorities before cited between those cases that require a rescission of the contract and return of the articles purchased, and those which do not. But on the motion for a new trial, the necessity of rescinding the contract and returning the stock was distinctly urged, and the court was evidently strongly impressed with the soundness of this view. The learned judge, in deciding the motion, observes: "The plaintiff, with considerable

force, says that the defendant should not avoid payment of the notes and retain the stock. Although the stock is valueless *to the defendant*, and never had any value, yet the plaintiff has a right to the possession of it, and a new trial will be granted unless the defendant deliver to the clerk of this court, for the plaintiff, said stock or equivalent shares of said stock within five days, whereupon the motion for a new trial will be denied." A fact which does not distinctly appear in the finding, or to be within the issues tried, is here assumed, viz.: that "the stock is valueless to the defendant, and never had any value." But the court, nevertheless, seems to be of the opinion that it might be of value to the plaintiff, and that it must still, even after verdict and judgment, be returned, or a new trial had. We have seen, if it was absolutely of no value at all, there was no necessity for returning it; but if it was of some value, and on that ground it was necessary for the defendant to return it, then it was too late, after verdict and judgment, to offer it for the first time, on the requirement of the court as a condition of denying a new trial. We think, upon the whole, that a new trial should be had in order that the questions upon which the rights of the parties depend may be directly put in issue, tried and determined in view of the law as herein indicated.

Judgment and order denying a new trial reversed, and a new trial granted, with leave to the parties to amend their pleadings as they may be advised.

THE GLAMORGANSHIRE IRON AND COAL CO. V.
IRVINE.

(4 Foster & Finlason, 947. *Nisi Prius*, England, 1866.)

A reckless statement of the capacity of a mine put forth with a view to influence persons to take shares, and not upon a fair and reasonable belief of its truth: *Held*, to amount to fraud.

¹ Board of directors—Prospectus. In an action by a company for calls, plea that the defendant was induced to become a holder of shares by means of the fraud of the plaintiffs: *Held*, that fraud of the directors

¹ *In re Russian Co.*, L. R. 1 Ch. App. 574.

as a board, and as a body, was fraud within the plea, and would avoid the contract. 2. That the publication, by the directors, of statements in their prospectus, false in fact, and calculated to mislead the public, if careless whether their statements were true or false, would amount to fraud. 3. That this would not the less be so, merely because the prospectus referred to reports of surveyors, which had in fact been received, and might have been referred to by the shareholders, if in point of fact they relied upon and were influenced by, the prospectus. 4. **Idem. Recklessness amounting to fraud.** The publication, by the directors of a prospectus prepared by the attorneys, the main promoters, without referring to the reports, or taking any pains to verify its statements, was evidence of such recklessness as would tend to show fraud within the above definition.

Action for calls; the declaration, in the common form, alleging that the defendant held certain shares upon which a call was duly made, etc.

PLEA: 1. Denying that he was the holder of shares, as alleged.

2. That he was induced to enter into the said contract, and became the holder of the said shares, by and through the fraud and misrepresentation of the plaintiffs and others in collusion with them; and that the defendant, within a reasonable time after he had discovered the said fraud, repudiated the said shares, etc. Issue.

MONTAGUE CHAMBERS, JOSEPH BROWN, TAYLOR, and GATES, for the plaintiffs.

PRENTICE, SIR GEORGE HONYMAN, and DAY, for the defendant.

This company was formed in 1865, for the purpose of purchasing and working some iron and coal mine in Glamorganshire, which was to be purchased from a Mr. Marshall, for £48,970. The capital of the company was to be £100,000, in 5,000 shares of £20 each. A prospectus was issued, in which it was stated that "the vendor, finding his capital insufficient for the immediate development of the property, deemed it requisite to secure, by the concession of valuable considerations, the aid of a public company." The property was described as connected with the general railway system of South Wales, and only ten miles from Cardiff, and it was stated that

it had "been fully reported upon by several mining engineers and well known scientific authorities on coal and iron." It was estimated that the property would yield 7,000,000 tons of coal, and the quality of the steam coal was stated to be the same as that of the celebrated Risca and Abercarn measures. The reports, it was stated, showed that "the coal and argillaceous ironstone deposits might be said to be practically inexhaustible;" and that, in addition to this, there was an abundant supply of tin, limestone, fire-clay and building stone. It was represented that the produce of coal would be 90,000 tons a year, and that the profit would be £14,000; and that the profit from iron would be £12,000 a year. It was stated that the net profits were to be £27,924, or, after allowing for every expense, about thirty-three per cent. on the capital necessary to be called up at long intervals. The vendor, it was stated, had secured to the satisfaction of the directors a minimum dividend of ten per cent. for three years on the paid-up capital. The prospectus also stated, quoting from one of the reports, that the property was most advantageously situate, and, with low royalties and other advantages, iron might be made and coal exported at prices considerably under other localities where these peculiar advantages did not exist. The prospectus closed by stating that the plans of the works, and the engineer's reports on which the prospectus was based, were at the company's offices for inspection. Defendant, having seen this prospectus, applied for forty shares, but was only allotted fifteen, upon each of which he paid £1 on application, and £2 on allotment. The rules of the Stock Exchange required that three fourths of the capital should be subscribed before a settlement day could be appointed, and it was represented that the requisite proportion of capital was subscribed, and that the settlement day was applied for. There was an investigation, and the result was unfavorable. The defendant, and several other persons who held shares in the company, refused to pay the first call of £3 per share, on the ground that they had been deceived by the fraudulent representations of the directors as to the value of the property. Ten actions were then brought to enforce payment, among which was the present, and it was understood that this case should decide all the others.

On the part of the plaintiffs, a *prima facie* case was shown, and the late secretary was called to prove that the defendant held the shares, and that the calls had been made.

The case for the defendant was, that the whole concern was fraudulent. That the man from whom the company bought the mine, one Marshall, had been a cabinet-maker in Bristol, and had failed in business, and paid 2s. 6d. in the pound; that the property was really of such small value that the plant, the only valuable part of the concern, was at one time valued at only £2,100; that the shareholders were for the most part as fictitious as the rest of the concern, and that 1,500 of them were nothing but "dummies;" that all sorts of arts were resorted to for the purpose of getting a settling day at the Stock Exchange, and the shares were got up to £12 premium, but that the Stock Exchange made some inquiries, and the bubble burst; that the representations in the prospectus as to the value and the profits were utterly false, and that the directors, who were appointed by the promoters, had involved the concern in debt and made it insolvent.

Several witnesses were then called for the defendant as to the real value of the property.

Chambers objected to this head of evidence, insisting that as upon the face of the prospectus the reports of engineers were referred to, the defendant must either show that no such reports had been received, or that they were fraudulent. The question, he urged, was not the real state of things but the state of things as they really appeared to the directors.

WILLES, J., however, said that he could not exclude evidence as to the real state of things and the true value of the property; for if it should appear that the mine was worth little or nothing when it was represented as worth £50,000, it could hardly be said that this was not material evidence in the case. It was laying a foundation, so to speak, for a case of fraud.

The witnesses stated that the mine was worth little or nothing, all of them putting a much lower value on the property and its prospects than that mentioned in the prospectus. They stated that the coal was so bad that it would not be worth raising, and the committee of investigation had put the estimated yield of the mine at 1,500,000 tons instead of

7,000,000, as stated in the prospectus. It was, however, admitted in cross-examination that engineers often differed as to value.

Marshall, the person from whom the company bought the lease of the mine, was called for the defendant, and stated that in 1863 he took the lease. He could not tell how much coal he raised during the two years he held the mine. He was obliged to give up the mine because he had not enough capital to carry it on. He went to London to try to borrow some money on the mine, but found it very difficult to do so, and while trying was introduced by the present brokers of the company to a firm of attorneys, who proposed starting a company. He ultimately received £48,970 for the mine, £17,000 of which was by cash, £24,000 by paid-up shares, and the rest by bills and debentures. When he took the mine from the former owner he paid £800 for the plant, but he afterward spent £2,000 or £3,000 in addition.

It came out in the cross-examination of some of the witnesses that the attorneys were the leading promoters, and that the promoters appointed the directors; that £10,000 was paid to the firm of solicitors referred to, for preliminary expenses, but of which no account was kept, and that a sum of £2,000 had been paid to the chairman of the company; that the committee requested it to be repaid, and that it had been. It was also stated that £200 had been given to each of the directors by the attorneys. It appeared, however, that one of them received this for a report to be made (verbally) as favorable to the mine.

It appeared that in fact only £800 had been realized by the sale of coal, and no profit had been made by the working of iron.

The prospectus, however, was issued and read before the allotment, and was, as regards profits, prospective, and rested upon the statement of present facts as to the mine.

The defendant was called, and stated that he had seen the prospectus before he applied for shares, and was influenced by its statements. It was elicited that he had seen Marshall, the former owner of the mine, who had spoken to him highly of it; but then, it also appeared that Marshall himself referred to the prospectus.

At the close of the evidence for the defense, Chambers submitted that the defendant's case had not been made out. He contended that it had not been so, for no fraud had been made out against the company, and because it had been proved that the directors founded their prospectus on the reports of engineers who had inspected the mine, and also because the last paragraph in the prospectus invited persons to go to the office to inspect these reports, which the defendant ought to have done. His first proposition was, that if individual directors misconducted themselves, they could not do it with impunity, because actions would lie against them; but their fraudulent representatives would not affect a whole company of existing shareholders and directors. His next point was, that unless the defendant could prove that the reports which the company professed to have had in their possession were not in existence, or that the company knew them to be untrue, or even had reason to suspect them to be untrue, then the defense was not sustained, and the plaintiffs would be entitled to a verdict.

WILLES, J., however, said he certainly should not stop the case. As to the first point, it was laid down in a case in the House of Lords, that if a company adopt and take advantage of a contract made by the directors by means of fraud, the fraud can be set up as a defense. As to the other point, it rather goes to the question whether there is evidence of fraud, or that the defendant was defrauded, which would be for the jury assuming there is any evidence of it, which I can not say there is not. There is evidence that statements in the prospectus were untrue, and that they influenced the defendant. As to the reports, at present there is no evidence about them, and as the case stands, there is evidence for the plaintiff.

I think there is certainly evidence to go to the jury, for instance, as to the difference between the statement in the report that the mine would yield 7,000,000 tons of coal, and that of the witnesses for the defendant that it would yield only 1,500,000 tons.

Evidence on the part of the plaintiffs, in rebuttal of the case of fraud was then gone into.

The late secretary of the company was then called, and said he was present at the time when the prospectus was approved and that he suggested some of the words to be inserted in it.

The directors received the reports referred to before making the prospectus, and had interviews with the gentlemen who made them.

In cross-examination the witness stated that the attorneys referred to had most to do with making the prospectus, and that it was substantially drawn up by them.

One Bayliss, a civil engineer, and a late director of the company, deposed that he had thirty years' experience in coal mines, and before he joined the direction of the company he went down and examined the property and was fully satisfied that its value was what was represented. He was managing director at the works in Wales. He had £200 from the attorneys. It was for professional services. They asked him to look at the mine before he joined it and he did so, and made a report, and he supposed it was that for which the attorneys gave him the £200. The report was not a written one.

Two of the engineers, who had made reports on the mine, were called and their reports were put in and read, and they gave evidence in affirmance of the statements therein contained.

The reports contained statements which bore out the statements in the prospectus as to the capabilities of the mine: that it would produce 90,000 tons of coal a year, and that there was iron, etc. They however professed to be only estimates, and they avowed that they were open to error.

One or two other witnesses were called to support these statements, but the fundamental statement as to the quantity of coal was not borne out, nor the statements as to profit.

PRENTICE, in summing up the case for the defendant, submitted that the main question was, whether there was any ground, after the evidence that had been given, for asserting that there had been any honest valuation of the property made, and whether there was any reasonable ground that the profits would be as large as were represented.

CHAMBERS, in reply, urged that the pleas in this case ought to be proved as clearly as they would be if this were an indictment framed against a person of obtaining money under false pretenses; for this was really nothing more than another phase of a charge of that sort. He then went through the various reports and contended that they had been fully

confirmed by the evidence which had been given. He urged that the defendant ought to have gone to the office to inspect the reports, as he was invited to do by the last paragraph in the prospectus, and that he could not profess to have been defrauded.

He insisted that the directors could only be guided by reports; that they distinctly put forth the statements in the prospectus on the faith of the report they had referred to, and that it appeared they had actually received the reports; and that there was no evidence that they were willfully false, or that even if they were so, the directors were parties to the fraud; that reports upon such subjects must necessarily to a great degree be matter of opinion; and that there was no evidence of willful falsification of facts.

WILLES, J., in summing up, commenced by stating the following propositions which he had written down, for the guidance of the jury: 1. "It is a fraud to state dishonestly for the purpose of gain that which is false in fact and material, either knowing it to be untrue, or recklessly without knowing or caring whether it is true or false, for the purpose of its being acted upon as true, and of so deceiving the person who seeks to avoid the transaction into which he is thereby misled." 2. "A person who is taken in by a fraud may elect to avoid the transaction within a reasonable time after the discovery of the fraud, and before he has taken any benefit under it." 3. "A company is not answerable for the fraud of individual directors, or of directors acting otherwise than on a board, or by the authority of the company." 4. "But that a company can not any more than a private individual, enforce a contract to which a party has been procured by the fraud of its agents." The best way to apply these propositions to the present case, he said, was to ask, was the defendant defrauded? Who defrauded him? What was the fraud? The question whether there was a falsehood in fact in the prospectus must be determined with reference to the view the jury took of the whole of the evidence.

The defendant, no doubt, is bound to make out a case of moral fraud, but that does not necessarily involve a knowledge of falsehood. It is a fraud to state things which are untrue, for the purpose of gain; whether the statement is made with a knowledge of their untruth, or with a reckless disre-

gard of whether they are true or false, if it be with the intention of misleading another. To state things, knowing them to be false, or not knowing whether they are true or false, and careless whether they are true or not, is equally fraudulent. Utter carelessness of truth, when the interests of others are concerned, is evidence of fraud. And it is for the jury to consider whether statements in the prospectus proved to have been untrue in fact, were put forth carefully or recklessly, with the intention of influencing, and thus misleading others; or honestly, and in the fair and reasonable belief in their truth.

The learned judge then went carefully through the evidence, and called special attention to the fact of the absence of all the parties who were connected with the allotment of the shares in the first instance, although they were the parties who knew most about the starting of the company.

He also pointed out the particulars in which he thought the evidence did not agree with the statements made in the prospectus.

No mining engineer was called who supported the fundamental statement in the prospectus as to the contents of the mine, and only one engineer spoke as to the annual quantity it would produce, and there was little evidence as to the value of the produce. Nor did it appear that the directors referred to the reports before they issued the prospectus.

The main question for the jury is, whether the prospectus contained fraudulent statements; for if so, there can be no doubt it was issued by the directors, and influenced the defendant to take the shares; or, that he repudiated in a reasonable time.

Now, as to this main question there is the fundamental statement as to the capacity or capability of the mine, which was falsified by the committee of investigation, and has not been supported by any reliable evidence. Not a single mining engineer has supplied it. Was that statement put forth honestly and in the fair and reasonable belief of its truths; or recklessly, and with a view to influence persons to take shares?

So as to the other statements which have been falsified.

The question is, whether the company, through its directors, issued a fraudulent prospectus.

Verdict for the defendant.

BRUFF, Executor, v. MALI ET AL.

(36 New York, 200. Court of Appeals, 1867.)

Personal liability for over issue of stock. Officers of a corporation guilty of an over issue of stock are liable to those persons into whose hands the shares may come, the same as if they had been issued to the plaintiff directly.

Shifting burden of proof. In such action to recover the cost of such spurious shares, when the plaintiff has proved that the shares in question were not issued until after all the authorized stock had been issued, the burden of proof is upon the defendants to show that the shares were genuine, or were issued in lieu of genuine canceled shares.

Appeal from the general term of the Supreme Court, of the First District, where a judgment entered upon a verdict in favor of the plaintiff, has been affirmed.

This was an action brought by one Shotwell against Hippolite Mali and Otis P. Jewett, the former president and vice president of the Parker Vein Coal Company, a Maryland corporation, having its principal place of business in New York, to recover the amount of certain spurious certificates of stock issued to the plaintiff, which was part of an over issue by the defendants. The plaintiff died pending the action, and it was prosecuted by Richard P. Bruff, his executor.

The complaint contained three separate counts or causes of action. In the first, after an averment that the plaintiff was a stockholder, it was charged that the defendants misconducted themselves in their offices of president and vice president, and wrongfully and fraudulently over issued the stock of the company, by reason of which the plaintiff's stock was rendered unsalable and valueless. In the second it was charged that the defendants made false and fraudulent representations in regard to the financial affairs of the company, whereby the plaintiff was induced to purchase stock of the company, which, in fact, was valueless. In the third it was averred, that the defendants, as officers of the company, and after the whole amount of the capital stock had been issued, made and issued other certificates, purporting to be genuine certificates of shares of the capital stock of the company,

which were false and fraudulent, and sold and disposed of the same as true and genuine stock, 480 shares of which the plaintiff purchased and received as genuine, to his great damage.

The facts of the case, and the exceptions taken on the trial, are fully stated in the opinion of the court. The plaintiff recovered a verdict under the third count; and the judgment entered thereon having been affirmed at the general term, the defendants appealed to this court.

BOCKES, J. (after stating the case).

On the trial the judge held and decided that the plaintiff was not entitled to recover, on either the first or second counts of the complaint. Whether he was right or wrong in this ruling is not before us for decision, inasmuch as the plaintiff did not appeal. The recovery was under the third count, and the questions presented to the court for examination arise under the appeal by the defendant from the judgment having its basis on that count.

It may be well to examine the case in the order in which the questions arose on the trial. It was not disputed that the defendants, Mali and Jewett, were officers of the company; both were directors; the former its president, and the latter its vice-president. Nor was it controverted before the court, on the trial, that after the whole capital stock of the company was filled, and certificates of the entire amount issued, the defendants, without authority, continued to make further and over issues to an enormous and ruinous amount. It was proved, or there was evidence tending to prove, that fraudulent or over issues were made prior to the time when the plaintiff made his purchases, and prior to the date of the certificates of stock issued to him—in small numbers at first, and afterward freely—and that the over issues were made by the defendants deliberately, from time to time, as inducements were suggested. The authorized capital stock was \$3,000,000; the spurious stock from over issues exceeded \$12,000,000.

Under this state of facts the plaintiff rested the case, and the defendants moved for a dismissal of the complaint. The

judge remarked, in substance, that if it appeared from the evidence that the plaintiff's certificates of stock were issued after the stock was full and over issues had commenced, and that, in the absence of evidence that the certificates were given on the surrender of stock, it was for the jury to say whether they were genuine; and he denied the motion. This ruling was manifestly correct. The genuine certificates were all out before those obtained by the plaintiff were issued; there was no proof, then, that any of the genuine certificates had been surrendered and new ones issued in their place. It might well be that there had been, but there was no proof of it in the case; there was only a suspicion, growing out of a probability, because the stock, or what purported to be stock of the company, had been in the market.

Thereupon evidence was given by the defendants to the effect that, from a time prior to the purchase by the plaintiff of his stock, there were surrenders and transfers of certificates to a very great extent, daily, at the office of the company; but the witness was unable to say whether such surrender and transfers were of the genuine or spurious stock; at least, he did not identify a single transaction of the kind, where the stock was issued prior to the issuing of the spurious certificates, and, in regard to the certificates held by the plaintiff, he said it was impossible for him to say whether they were issued on the sale of stock for cash, or whether they were issued on the surrender of other certificates; that it would be a mere presumption for him to state.

The judge was then requested to hold and to instruct the jury, that there was not sufficient evidence to warrant a finding that the stock in question was not genuine, which he declined to do. This decision was also correct. It was very doubtful whether the case was materially changed from what it was when the plaintiff rested. Did the evidence given by the defendant clearly and indisputably establish the fact, that the plaintiff's certificates were genuine, or were issued on a surrender or transfer of genuine stock? Certainly not; and if not, then the question still remained for the jury, and it would have been error to have instructed them as requested. Even if the case had been changed by the defendant's evidence, unless made entirely certain in their favor, it would still re-

main for the jury to say what effect should be given to the evidence especially, if it was, to a considerable degree, a matter of opinion or reasoning, and also to what extent a change had been effected by the proof. All that the defendants could rightfully claim, as regards this point was, that the judge should charge as he did do; that, to entitle the plaintiff to recover, he was bound to prove to the satisfaction of the jury that the certificate bought by him did not represent genuine stock, or any part of the stock of the company, but constituted a part of the over issue, not authorized by its charter. There was evidence before the jury bearing strongly on this question. The entire stock of the company had been taken, and certificates therefor issued, after which and prior to the purchases by the plaintiff, the defendants had commenced their system of false issues. The plaintiff's certificates certainly belonged to the class of spurious issues, unless genuine ones had been surrendered and new ones sent out in their place. The burden was on them to remove the inference deducible from these facts, and which they could have done by showing that the plaintiff's certificates were issued on the surrender, or on the transfer of genuine stock. This might be difficult, but if so, or even if actually possible, the defendants should not be heard to complain, when their own admitted culpability creates the dilemma.

No error occurred in the admission or rejection of evidence. None was admitted against objection bearing on the question submitted to the jury; nor was any excluded to which the defendants were entitled. They were allowed to prove that the plaintiff voted, or authorized some one to vote on his stock, as some evidence bearing on the question of its genuineness. But the offer to show that the directors of the Parker Vein Coal Company, with the consent of the plaintiff, transferred the property of the company to the American Coal Company, and accepted the stock in the latter in the exchange for the stock of the former, and that the plaintiff took stock in the latter under this arrangement was properly rejected. Those facts had no tendency to prove that the plaintiff's certificates represented the genuine stock of the original company. How he disposed of the stock did not prove it genuine or otherwise; this was a matter with which

the defendants had no concern; their liability was complete, if liable at all, at the time of the purchase by the plaintiff.

The case having been properly sent to the jury, and the jury having found in favor of the plaintiff, must now be further examined on the hypothesis that the plaintiff's certificates did not represent the genuine stock of the company, but were spurious. In this view, the defendants asked the judge to charge the jury, as matter of law, that even if spurious there was no evidence that the certificates in question were purchased from the defendants or from the Parker Vein Coal Company, and that if not purchased from either, then they were not liable in this action. These requests and the refusal of the judge so to hold and charge, present the only remaining question of importance pressed on our consideration. The learned judge instructed the jury on this point as follows: "That there was no evidence that the certificates were purchased from either the defendants or the company, but that it was unnecessary for the plaintiff to prove that he purchased from either; that if the defendants issued the stock and the plaintiff purchased it on the faith that it was genuine, authenticated as it was, the defendants were liable, although the actual purchase was made of others." It is undoubtedly true that a vendor of property guilty of a fraud on its sale, or who sells with warranty, is liable only to his vendee; a subsequent purchaser acquires no right of action therefor. As was well stated by the court below, there is, in such case, no privity between the vendor and such subsequent purchaser. But, is such this case? Let us see clearly what facts must be deemed established by the verdict of the jury.

The verdict is general for the plaintiff, and every intentment is in favor both of its correctness and completeness to sustain the recovery. The jury have found that the certificates of stock purchased by the plaintiff were spurious; that the defendants issued or caused them to be issued with a fraudulent purpose, and that the plaintiff purchased them in good faith supposing them to be genuine, that is, supposing them truly to represent a part of the capital stock of the company; that they could not be enforced or employed as stock; in other words, that they gave the purchaser no rights as stockholders, as decided in *New York & New Haven R.*

R. Co. v. Schuyler, 34 N. Y. 30. These false certificates were sent forth by the defendants, were thrown on the market by them, as was said in the case cited, "with a view to well known and established commercial usages." They authenticated them falsely, and fraudulently attested them as genuine. They bore on their face such false attestation, which was equivalent to an assertion on their part, to all persons who should purchase or to whom they should be offered, that they were genuine. In this way they invited confidence and induced trade. These acts were done with intent to defraud any and all purchasers, well knowing that every person to whose hands these false certificates should come by fair purchase might be injured. Therefore, having authenticated and issued these certificates for the purpose of defrauding, the defendants should be held liable to any one sustaining damage by purchasing on the faith of their genuineness. In this view the defendants are to be considered as acting directly upon and influencing the purchaser, and, of course, liable, as every tortfeasor is, for the damages occasioned by their wrongful act.

It was held in the New York & New Haven Railroad case, above cited, that every *bona fide* holder of spurious certificates, (issued as were those of the plaintiff here), had a right of action against the company for negligence in permitting its officer and agent to perpetrate a systematic course of fraud like that proved in this case. It mattered not how many transfers had been made; if the certificates had their origin in the fraudulent or over issues, they were void, and the *bona fide* holder had his claim against the company for damages occasioned by the fraudulent act of its agent, and in such a case a joint action will lie against principal and agent: *Phelps v. Wait*, 30 N. Y. 78; or a separate action against either: *Suydam v. Moore*, 8 Barb. 358. The wrongful act is the servant's, in fact, and the principal's by construction. So the rule which held the company liable in the New York & New Haven Railroad case, to *bona fide* holders of the spurious certificates, would certainly have held Schuyler, the agent, who perpetrated the fraud, also liable. It was also decided in this case, that to entitle a party holding spurious certificates to sue, no privity was necessary, except such as was created by the unlawful act and the consequential injury: See also *Gerhard v. Bates*, 2 Ellis & Bl. 476.

In *Thomas v. Winchester*, 6 N. Y. 397, the action was for negligence, charging the defendant with carelessness in labeling a deadly poison as a harmless medicine and sending it so labeled into market. The poison was sold by the defendant to Aspinwall, and by Aspinwall to Foord and by the latter to Thomas, the plaintiff, who administered it to his wife. The objection was taken that the action could not be sustained, as the defendant was a remote vendor of the article; and there was no connection, transaction or privity between him and the plaintiffs or either of them. The objection was not sustained, and it was held that the defendant was liable for improperly and negligently labeling the poison as a harmless medicine, and sending it forth into the market so labeled. The defendant would have been none the less liable if the illegal act had been intentioned and willful instead of negligent merely.

It necessarily follows from the doctrine established by the above cases, that the defendants having issued the false certificate of stock authenticated by them as genuine, and cast upon the market with fraudulent intent, are liable to every holder to whose hands they may come by fair purchase. The learned judge was right, therefore, in refusing to charge as requested.

We are referred to the case of *Seiser v. Mali*, 32 Barb. 76, as an authority against the theory adopted by the judge at the circuit. It will be seen, however, from the views above expressed, that the principles recognized in *Seiser v. Mali*, are not here at all impugned; but we are of the opinion that they were not there well applied. The same question was discussed in *Cuzeaux v. Mali*, 25 Barb. 578, by Mr. Justice MITCHELL, whose views and conclusions are approved. The judgment should be affirmed.

Judgment affirmed.

HUNT, J., dissented.

BRADLEY V. POOLE.

(98 Massachusetts, 169. Supreme Judicial Court, 1867.)

Nonsuit; discretion of lower court. The refusal to grant a nonsuit is in the discretion of the trial court, and no exception lies to the denial of the motion; and if defendant proceed to offer evidence, it is a waiver of the motion.

Meaning of general expressions. General expressions go to the jury to be interpreted according to the circumstances and other conversation between the same parties.

¹Slight misrepresentations in connection with bogus organization. A mining corporation bargained, through two of its directors, for mineral land in Colorado, at \$120,000, and in payment gave checks, not drawn upon funds, which the seller at once returned, agreeing to accept stock instead, and one of the directors paid him \$5,000 in cash, and paid off incumbrances amounting to \$6,500. The certificates required by law, showing the amount of capital and the amount paid in were filed, stating the capital at \$500,000, in shares of five dollars each, of which \$400,000 had been paid in; 20,000 shares were reserved as working capital; and of the 30,000 shares allotted to the vendor, 20,000 were issued to secure the party who had advanced the cash payment, and the balance of the 100,000 shares was distributed without consideration. Shortly afterward the company was enjoined against doing business, for non-payment of a tax of \$300. The defendant director sold stock to plaintiff on general statements that they were going to work it; that it was one of the best properties in Colorado, etc. On learning of the injunction, plaintiff demanded rescission. *Held*, that the facts warranted a recovery, the representations being taken in connection with the character of the original organization.

Vendee's knowledge of value. The statement by a vendee of stock that he did not suppose that its property was put in at the par of its shares, *held*, no such sufficient knowledge as to prevent rescission in a case where the material facts in proof showed a case of active fraud.

Contract for money received to the plaintiff's use, alleged to have been paid to the defendant in consequence of false and fraudulent representations made by him, for certain pretended shares in a corporation fraudulently organized which shares the plaintiff afterward tendered back; said false and fraudulent representations being "that said corporation was all right and would immediately prosecute the development of its property in Colorado and the business for which it was organized, and that said shares were of great value."

¹ *Field v. Pierce*, 3 M. R. 535; *Ahl's App.*, 3 M. R. 639; *Densmore Co. v. Densmore*, 3 M. R. 569.

At the trial in the Superior Court before AMES, J., the plaintiff, who lived in Portland, testified that he had previous stock transactions with the defendant, and one day in November, 1864, at the defendant's office, in Boston, "made some inquiries of him about the Stewart Gold Mining Company, saying at the same time that he would like to invest some money;" and the defendant answered: "Would you like to buy some stock in that company? I think I can let you have some," or "can buy you some." "It is one of the best properties in Colorado. It is very valuable. They are going right to work on it. It is all right. You had better buy some of the stock, and get your friends to do so;" and that the defendant said that the price of shares was one dollar and fifty cents each, and that "he" "would probably get it" at that rate, but did not say anything about the capital not having been paid in, nor about the organization of the company, nor about any injunction prohibiting it from doing business. And the plaintiff testified that he answered that he would take two thousand shares; and that soon afterward he received the certificate thereof from the defendant, and paid him three thousand dollars; that although he "heard that there was some trouble," yet it was not until in December, 1865, that he "knew anything definite about the company," when he heard that there was an injunction against its prosecuting business, and on examining the records at the office of the clerk of this court, found that such was the fact; and that on the same day he tendered back to the defendant an assignment of the shares, duly executed, and demanded repayment of his money, saying: "When I bought, you said it was all right. You said nothing of the injunction. I consider you had no right to issue any stock. You represented it as very valuable and all right and that they were going to work on it immediately;" but that the defendant refused to pay back the money. It appeared also by the plaintiff's testimony that "some months before" November, 1864, he had some conversation with the defendant about this company, the details of which did not appear.

The plaintiff introduced in evidence record copies of a complaint to this court by the treasurer of the Commonwealth against the Stewart Gold Mining Company for non-payment

of a tax of three hundred dollars and the decree thereon, ordering an injunction to issue restraining the company from prosecution of business, and the writ of injunction dated September 3, 1864, and the officer's return thereon, showing that it was served three days afterward on Charles Durham, the treasurer of the company; and it appeared that this injunction had never been removed.

The plaintiff also called Durham, as a witness, who testified that the projectors of the company were himself and the defendant, with Gustavus F. Sargent and some others, who together, on February 12, 1864, signed articles of association, under the general corporation act, and organized the company on that day; and the certificate deposited by officers of the company under the act, with the secretary of the Commonwealth, dated March 15, 1864, and filed the next day, was also put in evidence by the plaintiff, signed and sworn to by John Merrill as president, Durham as treasurer, and Merrill and Sargent, with the defendant, as a majority of the directors, certifying that "the amount of capital stock is five hundred thousand dollars, the par value of the shares is five dollars per share, the amount paid in is four hundred thousand dollars, the place of business is Boston," and "its purposes are to acquire mineral lands and mining rights in Colorado Territory, to mine on said lands and rights for gold and other ores, and to sell said ores, or to reduce the same to metals and sell the metals, as may be most for the advantage of the corporation." But the plaintiff, by his counsel, stated, "that he did not rely on the fact that the company delayed going on with mining operations, independent of concealments by the defendant."

And Durham testified further, as follows: "We had arranged to buy the property of a Mr. Coffin, from Colorado, at a hundred and twenty thousand dollars. The capital of the company was fixed at five hundred thousand dollars, of which one hundred thousand was to be working capital, that is, twenty thousand shares, at five dollars, were to remain in the treasurer's hands. Checks to the amount of a hundred and twenty thousand dollars were left with me to pay Coffin for the property, which was put into the company at five hundred thousand dollars, the owner of the mine accepting thirty thousand shares instead of the hundred and twenty thousand dollars

agreed on, and the checks were destroyed. The shares left with the treasurer were to be sold to raise a working capital. A lien on the property of about sixty-five hundred dollars was paid off, and about five thousand dollars paid to Coffin in cash. This money Poole furnished. I don't know where or how he obtained it. The land was considered as five hundred thousand dollars. The individual subscribers paid nothing on their shares. I had three thousand shares personally, and held the twenty thousand as treasurer in trust. Poole had three thousand in his own right, six thousand as agent, and twenty thousand as agent or trustee. He paid nothing into the treasury of the company. Coffin received shares as his profit. So far as I know, Poole has not been repaid the money he advanced. He has been one of the directors the whole time. On November 29, 1864, I transferred to the plaintiff two thousand shares from Poole's account, as agent, signing, 'Benjamin Poole, by Charles Durham, attorney.' Poole had previously given up his certificates to the company, and on disposing of any of the shares a new certificate was to issue. When he proposed to assign to the plaintiff, I inquired about the injunction, but he said that it did not amount to anything; that he would see the attorney-general and get it fixed."

On cross-examination the witness said that the transfer to the plaintiff was in Poole's name, as agent, and that he believed that Poole did not return the certificate standing in his name previously; and further testified that he then and ever since believed the property to be of great value.

At this stage of the case the plaintiff having rested, the defendant asked the judge to rule that the plaintiff was not entitled to recover, assuming all the facts offered in evidence by him to be fully proved; but the judge declined so to rule.

The cross-examination of Durham was therefore resumed, when he testified, that in March or April, 1864, he had a conversation with the plaintiff, at Portland, in the course of which the plaintiff introduced the subject of this mining company, and made inquiries concerning it, and in which the witness showed a prospectus and said that he thought it was valuable; that there was money in it; that the stock was divided into a hundred thousand shares at five dollars per share, and twenty thousand shares were reserved for working capital; and eighty

thousand shares, at a dollar and a half per share, would pay for the property put into the company; and the witness testified that he offered at that time to sell his own stock to the plaintiff. And it appears further, by the testimony of this witness, that thirteen certificates of stock in the company were issued together on March 18, 1864, and Poole was appointed "a committee to regulate the sale of the stock," and "none was to be issued until July, except by his authority;" that "the company did not want the stock to be put in the market until the incumbrances were paid off, and Poole was to retain the stock to meet the incumbrances and to let Coffin dispose of or distribute the balance of the twenty thousand shares in his hands, as agent or trustee, that should come to him after enough of his proportion had been sold to pay off the incumbrances;" and the witness repeated that "so far as he knew, none of the stockholders paid anything to the company for their shares."

The defendant testified, and offered much other testimony, including that of Sargent, tending to show "that after the project was suggested to him by Coffin, he expended much time and labor in getting authentic information about the value of the property; seeing, for that purpose, many persons from Colorado, familiar with such property and acquainted with this, all of them men of character and entitled to confidence; that he then and ever since believed that it was and is of very great value; that Coffin had expended his means and offered it at the price of a hundred and twenty thousand dollars, but preferred to be paid in stock if a company could be got up to operate it; that the defendant took three thousand shares in payment for his own services and expenses in making the arrangements; that he paid off the incumbrances from the proceeds of twenty thousand shares left in his hands, as agent, to be sold for Coffin, acting under Coffin's orders in so doing; that being applied to by the plaintiff, who wanted to buy in, he told him expressly that he did not intend to sell any of his own stock, and also that the capital stock was half a million, but he thought he could get some at a dollar and a half per share; that the plaintiff said that he would like some as a "flyer," and that, after some time, the defendant succeeded in getting two thousand shares transferred to the

plaintiff, half by Sargent and half by one Pierce, and the money paid by the plaintiff was immediately paid over to them; that no part of the stock so sold belonged to the defendant, and none of the money received was his; but that he acted merely as agent, not receiving one cent as commission or in any other way; and that in a conversation in the spring of 1864, he expressly told the plaintiff the amount of the capital stock of the company, and that the whole was paid for in property, and also told him the original price of the property as offered by Mr. Coffin."

The defendant further testified "that the delay in obtaining a working capital was for the purpose of ascertaining the best machinery and mode of working; that he fully believed that all the proceedings of the company had been legal and regular; that the injunction was only for the tax, and the company had intended to test the question as to its constitutionality; that officers were chosen before the purchase from Coffin was made; that the defendant and Sargent were a committee to buy; that the stock set apart for Coffin was distributed as he directed, after the sale of a portion to raise money for the incumbrances; that efforts had been made to sell stock to raise a working capital, but without success; that of the shares sold to the plaintiff one thousand stood in name of the defendant, as agent, but really belonged to one Pierce; and that in March the incumbrances had been paid and there was no reason for restraining the sale of the shares."

The defendant also contended and offered evidence tending to show that the representations to the plaintiff were not such as the plaintiff testified, but were mere general expressions of confidence and favorable expectations; and evidence was introduced tending to show that the mine was and is very rich in gold, but difficult of successful operation on account of the gold being in combination with sulphurets of other metals, and the plaintiff being recalled, admitted "that he did not suppose that the property actually cost the company five hundred thousand dollars, or was put into the company at the par value of the shares, but did suppose that it actually cost a large sum of money."

The defendant then renewed his request for a ruling that there was not sufficient evidence of false and fraudulent representations on his part; which the judge again refused.

In his closing argument to the jury the defendant contended "that he did not personally sell the stock, nor receive the money paid therefor, but was acting only as agent of third persons, and so was not responsible to the plaintiff for money had and received; that he made no fraudulent or false representation, but if he had, would not be liable in this action, because he was not the seller; that any representation that the property was valuable and all right, and that they expected to develop it, was too indefinite in its nature to mislead the plaintiff; and also that the plaintiff was not misled, but fully understood the general state of the facts, and bought upon his own judgment."

The plaintiff in closing, contended, on the contrary, "that the stock being issued for less than its par value, was fraudulent and void, and no title or value was conveyed to the plaintiff by the sale; that the defendant was bound to disclose the existence of the injunction and the manner in which the company had organized and the stock had been issued; and also that the alleged organization was a fraud, and the shares were intended to be distributed among buyers at a fictitious price, greatly beyond the cost and value of the entire property.

During the closing argument for the plaintiff, the attention of the court was called to the fact that the records of the company, which had been introduced in evidence, did not indicate that the articles of association, under which it was claimed to have been organized, were signed by any person; and the treasurer on search failed to find any original agreement signed by any of the persons described in his testimony as the projectors. The plaintiff contended that in this condition of the record, the company was not organized, and the alleged shares had no legal existence; but the judge ruled *pro forma* that evidence that the company had acted as if organized would be *prima facie* evidence that it had been organized; and that the non-production of the original agreement, duly signed, and the failure to record the same with the signatures were not conclusive proof of a fatal defect in the organization.

The judge instructed the jury, "that although it appeared in evidence that the organization of the company was irregu-

lar and perhaps improper, it did not necessarily follow that it was fraudulent; that if three or more persons owning real estate on which they intend to carry on mining operations, should, for the sake of convenience, organize themselves as a corporation, putting in their joint property at what they honestly, under the influence of sanguine or even somewhat extravagant expressions as to the prospects of the intended business, believe to be the value of the property, it would not be fraud, even though they should prove to be greatly mistaken in their estimate, but would be wholly a question of good faith and honest intent; and that they might be substantially in the same position as if they had paid in the amount of their shares in cash, and the company had distributed the same cash among the owners of the real estate as payment therefor; that the rule *caveat emptor* applies to the purchase of stock, as well as of other property, and the purchaser has to consider how much and what property the corporation own, what proportion of the whole is represented by a single share and whether the corporation owes any debts and to what amount, and if he is not misinformed on either of these points has no right to complain if he should be disappointed in the result."

And he further instructed them, "that if no money at all, or only a small amount to take off the incumbrances, was actually paid in, if the sellers and the buyers became joint owners as co-corporators, the question for them would be: Was it a scheme to deceive or mislead anybody? Was it a device to sell the property by causing unsuspecting persons to buy in, in such a manner that such buyers were to pay the full value or more, leaving the projectors to hold their shares free of cost or at a low price? Was it put in at a nominal and excessive price with the intent, by deeds or words, to convey to buyers the idea that the original projectors had really invested the nominal amount, or a very large amount in the purchase and preparation for business? Was it a mere bogus corporation, not having any real capital or only a small and nominal one, got up to run off the property at an excessive price by intentionally impressing buyers with the idea that the projectors had themselves invested according to the nominal price? And that if the answer to these questions should

be in the affirmative, any person buying stock of one of the projectors under such influences, might have a right to recover back the money paid to him on such purchase."

The judge instructed the jury also, "that they were next to consider the question whether the defendant sold the property in question personally, or was merely employed to procure it for the plaintiff; that if he acted merely as the agent of some third person, to whom he was accountable for the money that should be obtained he would not be responsible in this action; but if, on being applied to, he disclosed no agency for anybody else, but undertook, as between himself and the plaintiff, to procure and supply himself with two thousand shares to sell to him, and did so, that would be a sale by the defendant to the plaintiff; that the plaintiff claimed that at least a thousand of the shares stood in the name of Poole, and although the word "agent" was written after his name, yet he really had full control of them, and was not in fact agent for anybody, and that he and Sargent were one in interest and feeling, merely sharing the proceeds of the sale; but that the testimony of the defendant and Sargent wholly denied this claim."

And he instructed them further, "that if the company was honestly organized, and Poole sold the stock to the plaintiff, the latter, in order to recover, must show that Poole made representations about the property which were material, which were of a nature to influence his judgment in deciding to make the purchase; that those representations were untrue, and that Poole knew them to be untrue; that the representations that the company was all right had a very valuable property, and was about to go to work in developing it, would be immaterial if they were merely expressive, generally, of sanguine expectations and commendation of the enterprise as likely, in his belief to be profitable, but if, however, they were spoken on such an occasion, and in such a connection, and with such attending circumstances as reasonably to give the plaintiff to understand them to mean that the company was well organized, had ample means and paid up cash capital, they would be material; that if the plaintiff knew the true state of the facts already, and that the land was put in at a nominal price, and above all if he knew that the land constituted all the

actual capital of the company and the working capital was yet to be obtained by selling the reserved stock at the best price they could get, the plaintiff was not in a condition to say that the alleged misrepresentations affected or influenced his judgment; that the plaintiff must also prove that the representations were not true in the sense in which they were material, and also that defendant knew they were not true."

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

C. B. GOODRICH and T. H. SWEETSER, for the defendant.

T. M. HAYES, for the plaintiff.

CHAPMAN, J.

After the plaintiff's testimony was put in, the defendant's counsel requested the court to rule, that assuming that all the facts offered to be proved by the plaintiff were actually and fully proved, the plaintiff was not entitled to recover, and the case should be withdrawn from the jury and a verdict directed for the defendant. This motion was denied and the defendant excepts to the decision. But it is settled that it is a matter of discretion with the presiding judge whether he will grant or deny such a motion: *Bassett v. Porter*, 4 Cush. 487; *McGregory v. Prescott*, 5 Cush. 67; *Wentworth v. Leonard*, 4 Cush. 418. No exception, therefore, lies to his decision. The defendant then proceeded to offer evidence in the case; and by the authority of the cases cited this was a waiver of his motion.

After all the evidence was in, the defendant renewed his motion that the jury be instructed that there was no evidence of false and fraudulent representations on the part of the defendant. The judge declined to make such a ruling, and the evidence was submitted to the jury. The ruling is to be sustained if there was any evidence sufficient in law to authorize the jury to find that there were materially false and fraudulent representations on the part of the defendant. But several points were argued before the jury, and the instructions given to them by the presiding judge not only included the point above stated, but embraced the general principles of law

which are applicable to cases of this character. These instructions are excepted to.

The attention of the jury was directed not only to the representations made to the plaintiff at the time he purchased the stock, and the condition of the corporation at that time, but to the original character and object of the scheme.

The representations proved and relied upon were: "They are going right to work upon it. It is all right." It was properly left to the jury to interpret these statements. In connection with the circumstances of the case and the rest of the conversation between the parties, they would be authorized to interpret them as representations that the company had pecuniary means to engage in the business of mining upon their lands in Colorado, and had made arrangements to do so immediately, and that no legal obstacle existed to the prosecution of their business or the transfer of stock upon their books.

The evidence tended to show that the actual condition of things was very different from this. The company was organized in February, 1864, and the defendant was one of the projectors. The capital stock was fixed at five hundred thousand dollars, and the par value of the shares at five dollars, so that there would be a hundred thousand shares. It would be legally competent to the jury to find that this small value of the shares was intended rather as a lure to certain classes of purchasers of shares who might be easily imposed upon, than as indicating an intention to prosecute the business of mining. No money was paid by any of the associates to constitute this stock. All the property which the corporation had was certain mining lands in Colorado which were conveyed to them by Coffin. They paid him no money for them. They fixed the price at a hundred and twenty thousand dollars and gave checks for that amount. But they had no money on deposit to pay these checks; and the jury might believe that it was a fictitious arrangement, for the checks were immediately given up, and Coffin accepted in their stead thirty thousand shares of the stock. His land being the only capital possessed by the company, these shares were equivalent to three tenths of it; subject however to a debt of ten thousand five hundred dollars due to the defendant for money

which he had advanced. If they valued the shares at the price for which the defendant sold to the plaintiff, Coffin's shares would be worth forty-five thousand dollars. If they were valued at par, they would be worth one hundred and fifty thousand dollars, so that the price of one hundred and twenty thousand dollars was merely nominal. The value of the land was then called four hundred thousand dollars, and twenty thousand shares were reserved to be sold in order to obtain the other one hundred thousand dollars. The jury might believe that they never expected to raise such a sum in such a way; and that a hundred and twenty thousand dollars was, to the knowledge of all of them, a grossly exaggerated estimate of the value of the land, and that the projectors understood that the principal value of their stock consisted in the ingenious scheme which they had adopted for putting the shares in the market.

While they were in possession of no property except the land, and owed the defendant ten thousand five hundred dollars, the president, treasurer and three directors, of whom the defendant was one, made a certificate under oath, and filed it with the treasurer of the Commonwealth, on the 16th of March, 1864, in compliance with the requirements of Gen. Sts. c. 61, § 8, in which they made the following statement: "The amount of capital stock is five hundred thousand dollars, the par value of the shares is five dollars per share; the amount paid in, is four hundred thousand dollars." The jury might believe that this statement as to the amount paid in was false and fraudulent, and was designed to defraud the public.

On the 6th day of September, 1864, an injunction was served upon the company restraining them from doing any more business because they had not paid a tax of three hundred dollars which had been assessed upon them by the Commonwealth; and this injunction has never been removed. The jury would be authorized to take this fact into consideration in estimating the value of their property, and deciding whether their scheme was *bona fide* or fraudulent. After this the plaintiff purchased his stock, and it was transferred to him on November 29, 1864.

The jury might upon this evidence believe that the company was not all right, but that it could not legally proceed to do any business; that it was not going right to work, and

had neither the means nor the intention to do so; that the original scheme was fraudulent, and the property was estimated at a grossly fictitious value, and that the defendant and his associates had been guilty of false swearing in their official certificate, for the purpose of promoting their scheme. All these matters were properly submitted to the jury with instructions sufficiently full and appropriate. It may be well to refer to some of the cases in which some of the principles stated by the learned judge have been discussed.

In *Campbell v. Fleming*, 1 Ad. & El. 40, it was held that one who was induced to purchase stock in a mining company by fraudulent representations as to its value, might repudiate the transaction if he would do so as soon as he was informed of the fraud.

In *Duvergier v. Fellows*, 5 Bing. 248, it was held that a contract made between two persons who were engaged in getting up an illegal and fraudulent enterprise, made for the purpose of carrying on such enterprise, could not be enforced at law. Chief Justice Best says of the case: "It is manifest that the scheme in which parties to this action were engaged, was one of the bubbles by which, to the disgrace of the present age, a few projectors have obtained the money of a great number of ignorant and credulous persons, to the ruin of those dupes and their families, and by which a passion for gambling has been excited that has been most injurious to commerce and to the morals of the people." He further says that such schemes are fraud-traps; and injurious to the public welfare, and that the forming of them is indictable at common law.

These remarks are applicable to many transactions that have occurred in this country, and if the jury found them applicable to this case, there would be no ground to say that there was no legal evidence to sustain such finding. The weight of the evidence is not now before the court.

The case of *Bagshaw v. Seymour*, 4 C. B., N. S., 873, was an action against the chairman of the directors of an Australian gold mining company. By a false representation as to the amount of money which they had paid in, they procured the committee of the Stock Exchange to place the stock on their list, and thus give it character and credit. The

plaintiff was thereby induced to buy some shares of one Barclay, on the Stock Exchange. It was held by the common bench, that the defendant was liable to the plaintiff, on the ground of this fraudulent representation made to the directors of the Stock Exchange. The case was carried by the defendant to the House of Lords, and there abandoned. The doctrine established in the case was that all the associates who had united in the fraudulent representations to the public were equally liable to a purchaser whom they had thus deceived and injured.

In *Bedford v. Bagshaw*, 4 H. & N. 538, the Court of Exchequer held the same doctrine, in application to another Australian gold mining company. POLLOCK, B., remarked: "If a director of a company, one of the persons who puts the shares forth into the world, deliberately adopts a scheme of falsehood and fraud, the effect of which is that parties buy the shares in consequence of the falsehood, I should feel no difficulty in saying that in such a case an action is maintainable."

In *Clarke v. Dickson*, 6 C. B., N. S., 453, where there was a sale of shares in a lead and copper mining company, the directors in their prospectus made a representation that the property had been purchased at a certain large price, when in truth it had been purchased by one of the directors at a very insignificant price. It was held that a purchaser could recover of one of the directors, although the false representations were not the sole inducement to him to purchase.

In *Watson v. Earl Charlemont*, 12 Q. B. 856, all the judges concurred in holding that if an untrue representation appears to be the act of the body of directors, and it is fraudulently made, the members are all answerable for the fraud; also that if an untrue statement is published, which is likely to induce a party to enter into a contract, and he does so, the person who made the false statement is bound independently of any proof that the other party was actually induced by it to contract; and that *prima facie* it will be taken that he was influenced by it.

In *Jarrett v. Kennedy*, 6 C. B. 319, there had been a fraudulent suppression of facts by a majority of a railway committee. It was held that the plaintiff, who had sub-

scribed for some shares and paid the deposit to the company, might recover it back from one of the committee in an action for money had and received.

In the light of these cases, it is apparent that the representations alleged to be false were material, and that there was evidence sufficient in law to authorize the jury to find that they were false and fraudulent in material particulars; so that the court can not set aside the verdict on the ground that in these respects there is no evidence sufficient in law to support it.

But it is contended that the defendant contracted with the plaintiff as the agent of other persons, and that there is no evidence which is sufficient in law to authorize a verdict against him on the ground that he was the principal.

On this point the plaintiff testified that when he proposed to buy some stock the defendant answered, "I think I can let you have some," or "can buy you some," and in speaking of the price, said he would probably get it at a dollar and a half per share. He also said, "it is one of the best properties in Colorado. It is very valuable. They are going right to work upon it. It is all right. You had better buy some of the stock and get your friends to do so." The jury would be authorized to consider these expressions as evidence tending to show a personal interest in the sale rather than disinterested friendship. They might also consider the fact that the defendant was interested to get back the sum of ten thousand five hundred dollars which he had advanced rather than make sales of stock for the benefit of his associates. It appeared also in the plaintiff's evidence, that the transfer of the certificate to him was signed by Durham as the defendant's attorney, and that the money was paid by him to the defendant, who did not profess to receive it as agent, Durham corroborating him by stating that he made the transfer by the defendant's direction and as his attorney.

This testimony is sufficient in law to authorize the finding that the defendant acted as principal in the sale. None of it tends to show that he made the sale as the agent of Sargent and Pierce. The plaintiff testifies that he did so, and paid the money to them. But there is nothing to corroborate this statement, and its credibility was for the jury to decide upon.

It is also contended that the plaintiff had knowledge of the condition of the company to such an extent that he was not deceived. So far as this depends on the statements of Poole, the defendant, the jury might not be satisfied with them. The plaintiff admits that he did not suppose the property cost the company five hundred thousand dollars. But they did not represent that it cost over four hundred thousand dollars. He also says he did not suppose that it was put in at the par value of the shares. It was never represented that it was put in at that price. Poole also told him that the stock would be a dollar and a half per share. But that is a mere statement of the price at which Poole was ready to sell it, or at which he could probably get it. All this is far from including the material facts in the case.

It is not necessary to refer to all the details of the instructions given to the jury. It is sufficient to say that they were in conformity with the decisions above referred to, and with the established principles of law as recognized both in England and this country.

Exceptions overruled.

THE BWLCH Y PLWM LEAD MINING CO. V. BAYNES.

(Law Reports 2 Ex. 324. Court of Exchequer, 1867.)

¹ **Fraud, a defense to action for calls.** It is a good plea to an action by a company against a shareholder for calls that the defendant was induced to purchase his shares by the fraud of the plaintiff, that he had never recognized since notice of the fraud any rights or liabilities as such shareholder, nor received any benefit from his shares, and that within a reasonable time after notice of the fraud he had repudiated his shares and given due notice thereof.

DECLARATION. That the plaintiffs are a company, registered and incorporated under the Joint Stock Companies Act, 1856-57, and the defendant is a holder of 307 shares in the said company, and is, as such shareholder, indebted to the plaintiffs in £153 10s., for a call of 10s. on each of the said shares, which said call was duly made by the said company, under

¹ *Smith v. Reese River Co.*, L. B. 2 Eq. 264; *Post* PROSPECTUS.

and according to the said acts, upon the defendant, as the holder of the said shares, in respect of moneys unpaid thereon; but the defendant has not paid the same.

Plea: that the defendant was induced to become the holder of the said shares by the fraud of the plaintiffs; and that he, the defendant, never, after he had notice of the said fraud, recognized any rights or liabilities in him, the defendant, as a shareholder, and has never received, and will not receive, any benefit whatever from the said shares; and within a reasonable time after he had notice of the said fraud, and before he had received any benefit from or in respect of the said shares, or any of them, he, the defendant, repudiated and disclaimed the said shares and all title thereto and all liability in respect thereof, and gave notice of his repudiation and disclaimer thereof to the plaintiffs.

Demurrer and joinder.

MORGAN LLOYD, COXON with him, in support of the demurrer.

R. E. TURNER, *contra*.

June 17. The judgment of the court (KELLY, C. B., MARTIN and BRAMWELL, B. B.) was delivered by

BRAMWELL, B.

The question in this case, as Mr. Turner in his excellent argument said, arises in a common law action, in a common law court, and is to be decided on common law considerations. The plaintiff's case is founded on contract. There is no duty on the defendant except what he has undertaken; whether he is an original allottee, or whether he is a transferee who has been accepted by the plaintiffs as a shareholder, the case is the same. If the defendant is liable, it is because he has undertaken to fulfill the duties of a shareholder, in consideration of the plaintiffs giving to him the benefits of one. Now, it is a rule that a contract is voidable at the option of the person who has entered into it, if he has entered into it through the fraud of the other party, and has repudiated it on the discovery of the fraud. This includes giving up all benefit from it, and restoring the other party to the same condition as before, as far as possible. Now the plea alleges all these acts—fraud, prompt repudiation and restitution, as far as

possible. It must be good, therefore, at common law, and so we hold. Cases in equity, under the Winding-up Acts, have been referred to. On them we pronounce no opinion, save that they do not govern this case. It may be this defendant is liable under the Winding-up Acts, or that he can otherwise be made, in equity, liable to creditors. No question of that sort arises here. There is no replication, legal or equitable, that the plaintiffs are suing as trustees for creditors or any one else. There may be no creditor, and the action may be brought (we are far from saying it is) merely to indemnify those who have committed the fraud the defendant alleges.

But we can not help observing that creditors trust those who are *liable* as shareholders—those against whom the company is entitled to enforce the duty of shareholders. If the defendant had got on the registry through forgery of his name, he would not be liable, though as much trusted by creditors as now: See per Lord Justice TURNER, in *Ship's Case*, 2 DeG. J. & S. 544. But with this we have nothing to do. We have to decide a common law question. The authorities at common law are in the defendant's favor, and the ruling of Mr. Justice WILLES, at Guilford, in *Glamorganshire Iron and Coal Company v. Irvine*, 4 F. & F. 947, in 1866, is in point. Our judgment is for the defendant.

Judgment for the defendant.

Attorneys for plaintiffs: McLEOD & CANN.

Attorneys for defendant: MILLER & SMITH.

¹ BYARD V. HOLMES.

(93 New Jersey Law, 119. Supreme Court, 1868.)

² Choice of action by defrauded party. Where a party has paid money on a contract induced by fraudulent representations he may, (1) maintain an action for deceit against the person guilty of fraud, (2) he may waive the fraud and proceed for breach of the original contract, or (3), having legally rescinded the contract, he may recover in *assumpsit* whatever he has paid upon it.

¹ Same case, 6 M. R. 657.

² Like option in case of refusal to perform: *Graves v. White*, 87 N. Y. 463.

Suit based on rescission. Where the suit presupposes rescission of the contract plaintiff must show that the contract on which the money was paid has ceased to exist.

Fraud makes contract voidable, not void. Proof of fraud or misrepresentation does not of itself render a contract void, but voidable only at the option of the innocent party, and he must show not only the right to rescind, but that the contract has been, in fact, rescinded.

Partial rescission not allowed—Laches. A party seeking to rescind a contract must put the opposite party *in statu quo* so far as he is able to do it, and as soon as possible after discovery of the fraud. As long as he retains anything received under the contract, which he might have returned, there can be no rescission.

Condition precedent. The rescission must be complete before action brought.

In case. On rule to show cause, etc.

The declaration in this case contained only the common counts in *assumpsit*, for goods sold, work and labor done, money lent and advanced, money had and received, for interest and on account stated.

The following bill of particulars was furnished by the plaintiff:

HUGH HOLMES to JOHN BYARD, Dr.

Nov. 30, 1864. To money had and received by the defendant from the plaintiff, for the use of plaintiff	\$1,000
Dec. 1, 1864. To money had and received by the defendant from the plaintiff, for the use of plaintiff	500
	\$1,500

For which amount, with interest, plaintiff claims judgment. The above plaintiff will show before the court, and insist, that the above sum of fifteen hundred dollars was obtained from him by the said defendant during the latter part of the year, A. D. 1864, under false and fraudulent pretenses, to wit: that the defendant was the owner of a tract of land, situate on Oil creek, at McClintocksville, Pennsylvania, or elsewhere, consisting of seventy acres, or thereabouts; that he had purchased the said land, and that the title was in him, the said defendant; that large gains and profits would be realized by

¹ *Gifford v. Carvill*, 6 M. R. 558; *Blen v. Bear River Co.*, 3 M. R. 435.

boring for oil on said tract; that he, the said defendant, was organizing, or about to organize, an oil company, with a capital of seventy-five thousand dollars, or some other sum; which company should become the owner of the said tract, and the defendant thereby induced the said plaintiff to take stock in the said supposed company, to the said amount of fifteen hundred dollars; which same fifteen hundred dollars is the same sought to be recovered in this action. And the plaintiff now insists, and will insist before the court, that the said representations and pretenses of the said defendant were false; but that at the time they were made, this plaintiff, relying upon the truth of said representations, gave to the defendant the said sum above mentioned, in two payments, by his checks to the defendant's order, on the First National Bank of Paterson, at the dates and for the amounts herein first stated.

Defendant pleaded the general issue.

The cause was tried at the Passaic Circuit, before his honor, Justice BEDLE, and the jury rendered a verdict for the plaintiff for fifteen hundred dollars.

The defendant applied for and obtained a rule to show cause why the verdict should not be set aside and a new trial granted.

The case was heard before the chief justice, and Justices ELMER, VREDENBURG and WOODHULL.

C. PARKER, with whom was T. RUNYON, for the rule.

I. *Assumpsit* will not lie in this case.

The action is clearly for deceit; there is no sort of warranty.

Money was paid in exchange for chattels.

If there was a warranty, and that broken, *assumpsit* would lie. But if no warranty, the rule *caveat emptor* applies, unless there was deceit. If deceit, the action must be case.

The case is much stronger here, where money, although paid to Holmes, was paid to him as the trustee for a company, to get shares of stock: *Chandeler v. Lopus*, 1 Smith, L. C. 238 and 253; 2 Cro. 2.

: There are cases where money is obtained by fraud, in which suit may be brought for money had and received. In these cases the fraud amounts to larceny, or the obtaining money without authority: See cases in 2 Saund. Pl. and Ev. 384.

And to sustain action for such deceit, plaintiff must aver and prove a *scienter*: 2 Chitty's Pl. 687 and note; Ib. 680 and note.

This objection is fatal. No amendment is possible now, because the case was tried all through and submitted to the jury in this regard.

The court said in charging the jury "that it is not material in the case whether defendant had any actual intention to deceive or not."

At one time the court seemed to regard the case as one of a deposit with defendant of fifteen hundred dollars to be used in buying shares of a company to be constituted on a basis of seventy acres and that defendant did not so use it.

This theory is inapplicable. Defendant made no agreement as to any future application of money. He took the money as the price of so many shares of stock in a certain company, and if he is liable at all, it is because he falsified the qualities of the article sold. He was no agent or depositary.

II. The bill of particulars exhibited a case of deceit, but one which showed no damage, for it did not aver that the stock was worthless.

III. The plaintiff took the stock, almost immediately learned the falsity of the allegation set up as the inducing cause of this investment, actually saw the property in two or three months, yet made no complaint until February, 1866, the stock in the meantime having been worth one hundred per cent. advance.

This holding onto the fruits of the contract, bars subsequent suit: *Campbell v. Fleming*, 1 Ad. & Ell. 40; *Wontner v. Shairp*, 4 Man., Grang. and Scott, 404; *Shrewsbury v. Blount*, 2 Man. & Gr. 470.

What is a reasonable time is a question of law, and two and a half months is too long: *Wheaton v. Baker*, 14 Barb. 594; *Atwood v. Clark*, 2 Greenl. 249; *Holbrook v. Burt*, 22 Pick. 546; *Cook v. Gilman*, 34 N. H. 556; *Masson v. Bovet*, 1 Denio, 69; *Baker v. Robbins*, 2 Denio, 136; *Fisher*

v. *Conant*, 3 E. D. Smith 199; *Meyer v. Shoemaker*, 5 Barb. 322.

IV. Admission of illegal evidence.

What could one hundred and fifty shares of stock have been sold for in market up to August, 1865.

The question not admissible.

S. TUTTLE, contra.

WOODHULL, J.

This was an action of assumpsit to recover back fifteen hundred dollars paid by the plaintiff to the defendant, November 30th, and December 1, 1864, for stock in a company about to be organized to be called, "The New Jersey Petroleum Company."

The declaration contained only the common counts, with a bill of particulars annexed, setting forth the circumstances of the transaction between the plaintiff and the defendant, and alleging, in substance, that the defendant had induced the plaintiff to pay the fifteen hundred dollars, by fraudulently representing that the said company, when organized, would own about seventy acres of oil land, when, in fact, it never owned, and was never expected to own, more than about three and a half acres of such land.

The plea was the general issue; and the plaintiff obtained a verdict at the Passaic Circuit, December term, 1866, for the whole amount of his claim.

It appeared at the trial, that the plaintiff paid the fifteen hundred dollars to the defendant as alleged, and that defendant paid it over without delay to the treasurer of the company.

The company was not formally organized until December 7, 1864, and the plaintiff having received from the defendant, January 5, 1865, a certificate for one hundred and fifty shares in the capital stock of the said company, continued to hold the same without any offer to return it to the defendant until such offer was made at the trial of the cause, and there was no evidence in the case to warrant the inference that the stock in question was at any time totally without value.

It appeared further that the plaintiff had information as to the quantity of the land owned by the company, probably within two or three weeks, certainly within three months, after he received his certificate; that as early as October, 1865, he personally examined the property in question and knew all about it; and that the first complaint made to the defendant of any misrepresentation, was contained in a letter addressed to him by the plaintiff, February 12, 1866, the same letter containing also the first and only notice to him that the plaintiff intended to rescind the original contract, and hold him responsible for the money which had been paid upon it.

1. The first reason relied on for setting aside this verdict, was that the plaintiff could not maintain the action, because the facts set forth in the bill of particulars show a cause of action for which the proper remedy was an action on the case for deceit, and that proof of these facts was improperly admitted at the trial.

Admitting that, upon the facts stated, the plaintiff might have maintained an action on the case for deceit, it by no means follows that he was restricted to that remedy. He may unquestionably, in such a case, waive the fraud, and proceed for a breach of the original contract; or, having legally rescinded that contract, he may, in an action like the present, recover back whatever he has paid upon it. Now this last course appears to be precisely the one which the plaintiff intended to adopt.

So long as the original contract remained in force, no implied contract could possibly arise, binding the defendant to pay back to the plaintiff the money claimed in this suit. The plaintiff, therefore, could not maintain this action without showing that the contract on which the money was paid, had, in legal effect, ceased to exist. This essential preliminary fact the plaintiff proposed to establish in part, by proving such fraud in the transaction as would entitle him, at his option, to avoid it altogether; and for this purpose, certainly, the facts set forth in his bill of particulars were pertinent and material, and were properly admitted to be proved in this action.

It was further insisted on the part of the defendant, that the verdict was against the weight of evidence, both as to the

right to rescind and as to the actual rescission of the original contract.

2. Does it appear that the plaintiff had the right to rescind?

If the alleged misrepresentation as to the quantity of land owned by the company, was, in fact made by the defendant in the manner and with the effect alleged by the plaintiff, it was unquestionably such a fraud as would entitle him, at his option, to avoid the contract, notwithstanding that he might not be able to put the defendant in precisely the same condition that he was in before the contract was made. Even if not fraudulent, such misrepresentation would give one who had relied upon it the right to rescind, provided the other party could be placed in all respects *in statu quo*.

Professor PARSONS thus states the law upon this point: "Material misrepresentations, which go to the substance of a contract, avoid that contract, whether they are caused by mistake, and occur wholly without fault, or are designed and fraudulent": 2 Par. on Con. 786. That the learned author is not to be understood here as holding that such a misrepresentation will render a contract *ipso facto* void, is clear from what he had just said when speaking of the effect of fraud upon a contract. "Cases often say," he remarks, "that fraud makes a contract absolutely void, but by this it can not be meant that the innocent party can not waive the fraud and insist upon the contract": 2 Pars. on Con. 782. And that the law is as here indicated, there can be no doubt. Fraud in a contract does not of itself and necessarily, make the contract void, but only voidable at the option of the innocent and injured party: *Meyer v. Shoemaker*, 5 Barb. 319; *Wheaton v. Baker*, 14 Barb. 594; 2 Kent's Com. 480, and cases there cited, 2d ed.; 2 Pars. on Con. 680, note; *Masson v. Bovet*, 1 Denio, 69; *Baker v. Robbins*, 2 Denio, 136.

In the present case there can be no question that the alleged misrepresentation, if made at all, was fraudulent; for the defendant testifies that he knew from the first that the company neither owned, nor was expected to own, more than three or four acres of land. Proof of the misrepresentation, then, would seem to carry with it, necessarily, proof of fraud; and to determine whether the plaintiff had a right to rescind

as for fraud, the jury had simply to inquire whether the defendant did in fact represent that the company owned about seventy acres of oil land. They have found, as their verdict shows, that he did make such representation; and without undertaking to examine in detail the very contradictory testimony given on the trial, the conclusion to which I have come is, that while the evidence, on the whole, might well have justified a different finding as to the alleged misrepresentation, the verdict, so far as that part of the case is concerned, is not so clearly against the weight of evidence that it ought, for that reason alone, to be set aside.

3. Assuming that the plaintiff had a right to rescind, it remains to be considered whether there was evidence in the case to justify the jury in finding that he had, in fact, rescinded the original contract. On the argument in support of the verdict, it seemed to be taken for granted, that proving the contract fraudulent was the same thing as proving it utterly void, and therefore equivalent to proof of an actual rescission. But, as has been already shown, it is well settled that fraud does not of itself make a contract void, but only furnishes a legal ground for avoiding it, at the option of the injured party. And it appears to be equally well settled that while it is true that a contract may be avoided for discovered fraud, although the fraud-doer can not be put *in statu quo*, still so far as this can be done the other party is bound to do it, and to do it as soon as practicable after the discovery of the fraud; and that there can be no rescission so long as he retains anything received under the contract, which he might have returned, and the withholding of which might be injurious to the other party: *Campbell v. Fleming*, 1 Ad. & E. 40; *Cook v. Gilman*, 34 N. H. 556; *Masson v. Bovet*, 1 Denio, 69; *Cushing v. Wyman*, 38 Me. 589; *Evans v. Gale*, 1 Foster, 240; *Norton v. Young*, 3 Greenl. 30; *Sheppard v. Temple*, 3 N. H. 455; *Baker v. Robbins*, 2 Denio, 136; *Meyer v. Shoemaker*, 5 Barb. 319; *Wheaton v. Baker*, 14 Barb. 594; 2 Kent's Com. 480; 2 Parsons on Con. 680, note.

In *Cook v. Gilman*, PERLEY, C. J., delivering the opinion of the court, says: "This general rule, that the party who would recover back, on the ground of fraud, what he had parted with under a contract, must reasonably, and before he

brings his suit, return, or offer to return, whatever he has received under the contract, is extremely well established on authority, and may be regarded as fundamental and elementary." See many additional cases there cited.

In *Masson v. Bovet*, BEARDSLEY, J., states the rule and reason for it thus: "The party defrauded, if he would rescind the contract, must return, or offer to return, everything he received in execution of it. To retain the whole, or a part only of what was received upon the contract, is incompatible with its rescission, and hence the necessity of restoring what had been received upon it."

Applying these doctrines to the present case, it is clear that when this suit was commenced there had been no rescission at all of the original contract; for the plaintiff had neither, at that time, returned the certificate of stock, nor had he offered to return it, nor even given to the defendant any notice or intimation that he intended to do so. The offer to return the certificate at the trial was not sufficient to effect a rescission of the contract because it was not made within a reasonable time after the alleged discovery of the fraud. And even if sufficient, a rescission at that time could avail the plaintiff nothing in this suit.

The verdict must be set aside, and a new trial granted.

McALEER v. McMURRAY.

(58 Pennsylvania State, 126. Supreme Court, 1868.)

¹ **Essentials of materiality of misrepresentations.** Representations, to be such as will entitle a party to recover on the ground of deceit must not only be false but must also be intended to deceive, and must have been the inducement to the party to part with his money.

² **Stockholders can not complain of wrong done the corporation.** If agents to purchase land for a corporation, transfer it to the corporation for a higher price than they gave, this is a fraud on the company for which it alone can claim redress.

Fraud existing, but unknown to plaintiff. To maintain an action for deceit on the ground of fraudulent misrepresentations it must be affirmatively shown that they came to the plaintiff's knowledge and were the inducing cause of his loss.

¹ Compare *Patterson v. Hitchcock*, 5 M. R. 543; *Roosevelt v. Dale*, 6 M. R. 377; *Salisbury v. Howe*, 87 N. Y. 128.

² *Foot v. Cunard Co.*, 17 Fed. 46.

Presumption of fact from fact. One fact can not be presumed from another fact which is itself but an inference.

February 10, 1868. Before THOMPSON, C. J., STRONG, AGNEW and SHARSWOOD, J. J., READ, J., at *Nisi Prius*.

Error to the District Court of Philadelphia: To January term 1868. No. 63.

This was an action on the case for deceit brought by William McAleer against Andrew S. McMurray, Samuel Boyd, Daniel Baird, Robert Boyd, James Boyd, Daniel Boyd, John Cunningham and Robert Guy.

The declaration contained six counts. The first five counts charged substantially that the defendants organized a company to mine oil; had it incorporated by the name of the Olive Branch Oil Company, became directors, represented that its land had cost and was worth \$37,500, when it was worth but \$8,000; issued certificates; that there were 100,000 shares, on which \$5 each had been paid, when the capital was less than \$20,000 and the stock was of no value; that the deeds for the land falsely stated the consideration to be \$37,500, when the cost was less than \$10,000; that the land was of little value, and that the defendant, relying on these false representations, bought and paid for 500 shares of the stock. The sixth count averred that the defendants conspiring and intending to commit frauds, etc., organized and did the other acts mentioned in the former counts, and certified under oath that 50 cents per share had been paid on the stock; that they caused to be apportioned to themselves a large number of shares, which they sold to divers persons, and the plaintiff purchased 500 shares of one Riddle, who represented that certificates would be delivered when the company should be incorporated; that plaintiff not knowing the facts, but confiding in the representations and honesty of the transaction, paid Riddle \$625 for the stock and received a certificate for the shares; that the defendants had paid a much smaller sum than \$37,500 for the land, had taken that sum from the treasury, and, after paying the smaller sum, had appropriated the residue to their own use; that 50 cents per share had been paid on only a small portion of the 100,000 shares, and that the defendants had not paid

anything on their shares; that \$5 per share had never been paid to the company by any one, etc. All the counts stated that the plaintiff was deceived.

On the trial below, the plaintiff gave evidence by James Boyd, the secretary of the company, that one McElhenny was the projector of the company; that Baird, S. Boyd and himself participated; that McElhenny sold the land for \$12,500 cash and \$3,000 in stock; the price he asked was \$37,500; the difference was paid to some of the directors as commission; all paid in cash or checks except McElhenny; the checks of Baird and Cunningham, Robert and Samuel Boyd & Co., composed of Samuel, Daniel and James Boyd were returned to them; \$20,000 in cash came into the treasury; of the balance, \$1,500 were given to Baird and Cunningham, \$3,000 to Robert Boyd, and \$6,000 to Samuel Boyd & Co., besides the checks; these sums did not go on the books of the company; McElhenny gave receipts for \$37,500. Nothing was then paid to him. An assessment of 5 cents per share was called in and paid. McMurray did not know the price at which the land was sold. Samuel, Robert and Daniel Boyd and the witness knew. Thomas Riddle testified that in the spring of 1865 he sold to plaintiff 500 shares of Olive Branch stock. Plaintiff asked witness to sell him some oil stock—he wanted to buy 1,000 shares of Hubert oil stock. Witness sold him 500 shares of Hubert and 500 shares of Olive Branch. Witness told him he had Olive Branch stock, but did not want to sell it. Plaintiff made no inquiry about the value of the stock nor where the land was nor what it cost; he asked no questions; witness told him nothing about it; plaintiff simply wanted oil stock.

The plaintiffs gave in evidence also the deeds for the land to McMurray and the others; the aggregate consideration stated in the deeds was \$37,500; the deeds were made to McMurray and the others, because they were directors of the company, and letters patent had not been issued.

The articles of association, dated December 17, 1864; certificate of organization sworn to January 23, 1865, and duly recorded; letters patent, dated April 3, 1865; transfer to plaintiff from Riddle, May 15, 1865, and deed from McMurray and others to the company, dated June 19, 1865, were also given in evidence.

The defendant offered no evidence, but submitted points as follows, viz.:

1. To enable the plaintiff to recover, the jury must be satisfied that the defendants made the representations alleged in the declaration; that the same were false, were known by the defendants to be false, and were made by them fraudulently and with intent to deceive the plaintiff; that the plaintiff had the knowledge of such representations at the time of his purchase of the stock and relied upon them as true, and was induced to purchase, and did purchase by reason of the said representations.

2. To entitle the plaintiff to recover, the jury must be satisfied that the representations alleged to have been made by defendants, were made by them with a fraudulent purpose and with intent to deceive and mislead the plaintiff, and that the plaintiff purchased by reason of such representations.

3. Notwithstanding the jury should find that the defendants made the representations alleged, and that the same were false, unless such representations were made to the plaintiff or were intended to be and were accordingly communicated to him, the plaintiff can not recover.

4. Falsely stating the consideration in the deed to Olive Branch Oil Co. to be \$37,500, is not such a representation to any subsequent purchaser of the stock of said company of the price paid for the land conveyed in said deed as to render the defendants liable to such stockholders in an action for deceit in making such false statement.

The court declined to affirm the defendant's points, and reserving the points hereafter mentioned, charged that the record of the certificate was a publication to the world and that plaintiff was to be presumed to have examined and to know its contents, and that it was not necessary to prove actual knowledge and that the plaintiff could recover.

The points reserved were:

1. Whether the plaintiff was entitled to recover for the alleged fraud, or whether the company was the party defrauded.

2. Whether it was necessary to bring home personal knowledge to the plaintiff of the alleged misrepresentations in the recorded certificate.

The verdict was for the plaintiff.

The court in banc afterward entered judgment for the defendants on the reserved points, SHAWSWOOD, P. J., delivering the opinion as follows:

"We are now to consider the reserved point. It is too plain for argument that a stockholder of a corporation can not maintain an action against either directors or other persons for a wrong to the corporation. There is no privity to sustain the action. The creditor of a corporation might as well do so. Indeed, he would have a better right, for the damages suffered by the corporation ought to be applied, when recovered, to the payment of its debts, before being divided or distributed among the stockholders. It seems hardly necessary to cite cases for so plain a proposition. Yet in the struggles of injured stockholders for redress, this has been attempted and failed: *Smith v. Hurd*, 12 Met. 371; *Allen v. Curtis*, 26 Conn. 456; *Hersey v. Veazie*, 24 Maine, 9. The plaintiff's counsel have in effect recognized this in the form of their pleading. This action is only sustainable as an action for a deceit, against several persons. Nothing in the whole course of the law seems better settled than that to maintain such an action it must appear that plaintiff knew and relied upon the representations alleged to be false and fraudulent. We might cite for this every case from *Pasley v. Freeman*, 3 T. R. 51, down, but it will be enough to refer to the decisions of our own Supreme Court in *Huber v. Wilson*, 11 Harris, 178; *Harris v. Tyson*, 12 Id. 347. Justice WIGHTMAN, in one of the English cases cited and relied on by plaintiff's counsel (5 Ell. & B. 867), says of such an action: 'All the essentials for an action for false representation are here. The representation is untrue; it is known by the persons making it to be untrue; it is calculated to induce the plaintiff to act; and he, believing it, is induced to act accordingly.' There are authorities, no doubt, to be found to support the position that the representation need not be made directly to the plaintiff: *Gerhard v. Bates*, 2 Ell. & B. 476, and the American cases cited in the note to the same case, 75 E. C. L. R. 491; but it must be affirmatively shown to have come to the plaintiff's knowledge, and to have induced him to give the credit which has resulted in the loss. As GIBSON,

C. J., expressed it, 'a constructive deceit is a new thing under the sun': *Bokee v. Walker*, 2 Harris, 141. There was here no evidence whatever that the plaintiff knew of the false and fraudulent representations made by defendants, and if he did not know, he could not have been deceived by them.

The nearest approach to evidence of knowledge is the certificate of shares. It is argued that the plaintiff may be presumed to know that by the law of its organization the corporation was forbidden to issue shares for less than their par value, and the certificate on its face, therefore, is a representation of the fact that the company had received the full par for the stock. This is rather a remote inference, and the strong presumption is the other way, from the fact that only four months after the organization of the company he paid but one dollar and twenty-five cents a share for the stock when it called for five dollars. However, the answer is that there was no evidence that plaintiff ever saw a certificate till after he had bought the stock and it was transferred to him. Before that he could not have seen his own certificate, for it was not in existence. No doubt he inquired of his vendor how much had been called in on the stock, and might have been told in good faith that all that had been paid in was one dollar a share. It is urged, however, that the certificate which was recorded according to law, was a publication to the world of the facts set forth in it; that the plaintiff must be presumed to have consulted the record before he purchased, and, therefore, to have been deceived. The judge below so charged the jury having the question, but what was there in the Act of Assembly to raise any presumption that the plaintiff saw and relied on it? It was plainly intended to give information of the facts, but its object went no further. If, in truth, representations of the character complained of had come to the plaintiff's ears, he could not have been precluded from recovering by showing that the recorded certificate contained a statement of the exact truth.

It no more raised a presumption either in law or fact of the plaintiff's knowledge than would the posting up of the certificate in the company's office, or on the corners of the streets. Nor was it near so strong in point of fact as would have been the publication of it in a newspaper, proved to have been

taken and read by the plaintiff. It would be monstrous to say that such a publication should be evidence against a party to visit him with notice. How, then, could it be evidence for him of knowledge? It can not be inferred that a party reads all the contents of any newspaper he may choose to take: *Beltshoover v. Blackstock*, 3 Watts, 26. As experience of the common course of human actions is the mother of all presumptions, it would fall more within it to hold that the plaintiff read the publication in his newspaper than that he sent to Venango county to examine the records. We think there was neither presumption of law, nor of fact, to be submitted to the jury that there was any knowledge by plaintiff of the alleged false and fraudulent representations, and if he did not know of them, he, of course, was not deceived.

I have examined with great care every case which has been cited to us by the plaintiff's counsel as sustaining the action. Though there are some *dicta* in his favor, there is no decision. In *Adamson v. Jarvis*, 4 Bingh. 66, there was no question of plaintiff's knowledge. He had, as auctioneer and agent of the defendant, sold the goods of a third person and paid over the money to defendant, and was afterward mulcted in damages to the party injured. The action for the false and fraudulent representation by defendant of the goods as his, was held to be maintainable. The general language of C. J. BEST, which is here relied on, is to be qualified by the facts of the case, when he says: 'He who affirms either what he does not know to be true or knows to be false, to another's prejudice and his own gain, is, both in morality and law, guilty of falsehood, and must answer in damages.' *Scott v. Dixon*, 1 Ellis & Ellis, 1099, was the case of a false and fraudulent report made to shareholders, printed for general circulation; and part of the case was that plaintiff procured one of these reports and bought his stock on the faith of it. *Gerhard v. Bates*, 2 Ell. & Bl. 478, was a demurrer to a declaration which alleged certain false and fraudulent representations made in a public advertisement, and that defendants by means thereof induced the plaintiff to purchase his shares. *Denton v. The Great Northern Railway Co.*, 5 Ell. & Bl. 860, was an action against the defendants for a false and fraudulent representation in their time-table, by which plaintiff had suffered damage-

It was a fact in the case that the plaintiff had consulted the time-table before he took his passage. In *Wontner v. Shairp*, 4 M., Gr. & Sc. 404, it is expressly stated that the plaintiff saw the notice which contained the alleged false representations: *Bagshaw v. Seymour*, *Bagshaw v. Lane*, 18 C. B. 903; in the House of Lords, 4 C. B. N. S. 873. In consequence of the falsehood of the defendants, a committee of the Stock Exchange inserted the stock in an official list, which was made up from reports by the officers. It is stated expressly that the plaintiff saw the name of the stock inserted on the list, and bought on the faith of it. In *Belford v. Bagshaw*, 4 Hurlstone & Norman, 537, it appeared that the plaintiff was induced to purchase in consequence of the alleged fraud. *Barnes v. Pennell*, 2 Clark & Finnelly's Appeal cases, N. S. 479, was a Scotch appeal in the House of Lords. It was a proceeding to make the directors of a corporation liable for false and fraudulent representation; and Lord CAMPBELL said in the course of his opinion: 'It must be shown that the purchaser of these shares was induced to purchase them by the deceit of the directors.' *Cazeaux v. Mali*, 25 Barbour, 578, arose on demurrer to the complaint or declaration. It alleged that the plaintiff was influenced by the alleged fraud. Judge MITCHELL, after having laid down the proposition that 'the representation must have been made to deceive the plaintiff, and must have produced that effect,' observes afterward as to the complaint, 'He could not have been influenced if they had not been in some way reported to him.'

There are, however, two or three cases particularly relied on, which deserve more special notice. The first of these is *Watson v. The Earl of Charlemont et al.*, 12 Ad. & EH. N. S. 856. It was an action for money had and received, to recover back what had been paid on an alleged false and fraudulent representation. There was a public advertisement, and no evidence that the plaintiff saw it. At pp. 863, 864, there is a colloquy among the judges, which certainly strongly favors the plaintiff's case.

Lord DENMAN, C. J.—'I think that if an untrue statement is published, which is likely to induce a party to enter into a contract, and he does so, the person who made the false statement is bound independently of any proof that the other was actually induced by it to contract.'

COLERIDGE, J.—As at present advised, I am of opinion that if an advertisement is put out to induce parties to enter into a certain contract, and an individual does afterward enter into such contract, and then comes into court to complain of misrepresentation, it is no part of his case to show that he was cognizant of the advertisement. *Prima facie* it will be taken that he was influenced by it.' The other two judges acquiesced. If the law is here correctly stated, then there ought to be judgment for plaintiff on this reserved point. These judges did not think of submitting a question of fact without an evidence upon it to the jury. *Prima facie* is conclusive till evidence is given in contradiction. But after all this the case was decided in favor of the defendant, and the plaintiff non-suited on another ground, that there was no evidence that the defendant had received the money, Lord DENMAN expressly disclaiming to give an opinion upon any other point discussed during the argument. This case then is certainly no authority. The next case is *Wheelton et al v. Hardisty*, 8 Ell. & Bl. 232. That was an action on a life policy to which the fourth plea was that the declaration in the policy that plaintiff had not any fit since childhood, was untrue. To this plea there was what is termed an equitable replication, setting up that before the policy was entered into, defendants circulated a prospectus, whereby they undertook that their policies should be unquestionable, except on the grounds of fraud, and that the plaintiffs were induced to enter into the policy on the faith thereof.

On the trial it appeared that such a prospectus was issued, but no proof was given that the plaintiffs saw it, or were induced by it to make the policy. There were several rules taken, and among others, why a verdict should not be entered for the defendant on this equitable replication to the fourth plea, on the ground of the defect in the evidence. EARL, J., delivered the opinion of the court. On this point, he said: 'The evidence of the existence of the prospectus was quite as consistent with the plaintiffs' not knowing it or not being induced to act upon it, as of their knowing and acting upon it. The plaintiffs may well have effected the written contract without any reference to the prospectus, and modern cases have established that where the party on whom the *onus* lies of

proving an allegation, gives evidence as consistent with one view of the case as with the other, he fails in his proof.' Lord C. J. CAMPBELL dissented, putting his opinion mainly on the ground that the jury might presume from the circumstances that the plaintiffs had not seen the prospectus. 'I think,' says he, 'the jury might not unreasonably infer that according to the course of business, copies of the prospectus were given to the customers coming to the defendant's place of business, and were posted up in their office so as to be seen by all who dealt with them, the object of the defendants evidently being that the prospectus should be known as generally as possible.' 'If they saw and read the prospectus, the next inference would almost be inevitable, that the plaintiffs were induced to effect the policy with the defendants by the encouraging allegation that it would be unquestionable if they practiced no fraud in obtaining it.' Judgment was, however, entered for the defendants on the fourth plea and the equitable replication. The case was removed to the Exchequer Chamber, but on this part of the judgment below that court pronounced no opinion. This then is an authority for the defendant, and not for the plaintiff.

"There was another case referred to in the argument: *Langridge v. Levy*, 2 M. and W. 519. Defendant had sold a gun warranted or represented to be of a particular make. The person who bought it stated at the time that it was for the use of his son. The latter, who suffered an injury from it, brought the action. It is unnecessary to examine the grounds upon which Baron PARKE put the decision of that case. It is enough for our present purpose to notice that the plaintiff is stated to have known of the representation. In *Thomas v. Winchester*, 2 Selden, 396, defendant had placed a false label on a bottle containing poison, and it came through several hands to plaintiff. It is plain from the case that the plaintiff saw the label on the bottle before he swallowed its contents. In both these cases the question discussed was whether there was sufficient privity between the plaintiff and defendant.

"I have examined this case much more at length than is usual with me, both because of its novelty and importance, and, because, as I understand, there are several other cases pending of the same character. Indeed if every shareholder

of stock in an oil company, whose stock has fallen to zero, can maintain an action against the projectors, who have pocketed large gains by the sale of oil territory to the company, and made representations to induce the public to confide in the stock, which were not true, we may expect a very large crop of such actions. The plaintiff and others in the same situation are not, however, without remedy, and that a simple, complete and full one. An action in the name of the corporation at law will lie. Or if they refuse to allow that, then a bill in equity may be maintained by one stockholder for the benefit of all, making the corporation as well as the tortfeasors defendants, and thus in one proceeding in regard to each separate concern, complete and equal justice may be done to all: *Kitchen v. Cougnor*, 4 Russel Ch. R. 562; *Hodges v. New England Senna Co.*, 1 Rhode Island, 340; *Attorney Gen. v. Utica Ins. Co.*, 2 Johns. Ch. 385; *Robinson v. Smith*, 3 Paige, 231; *Cunningham v. Pell*, 5 Ibid. 607."

The plaintiff took a writ of error, and assigned for error the entry of judgment for the plaintiffs.

E. S. MILLER, for plaintiff in error.

H. S. HAGERT and G. W. BIDDLE, for defendants in error.

The opinion of the court was delivered February 27, 1868, by THOMPSON, C. J.

Not a word of testimony appears to have been given by the plaintiff to show that he was induced to purchase any stock in the "Olive Branch Oil Company" by direct representations, true or untrue, by any person. This essential was attempted to be supplied by presumptions—one to stand as a postulate and another as the inference. This is not admissible: *Douglass v. Mitchell*, 11 Casey, 446; and is the substance of the ruling of ERLE, C. J., in *Cominon Bench in Wheelton v. Hardisty*, 8 El. & Bl. 232. I can not well conceive of a case where a presumption of fact can never be drawn from presumptions of the same kind. The practical operation of the theory in this particular case is that it is to be presumed that the plaintiff must have seen and inspected the certificate of organization of the company, either in the auditor-general's or recorder's office, and by its false presen-

tation he is to be presumed to have been induced to purchase the stock in question. Neither one nor the other of these propositions asserts a natural or even a very probable result. They are not such presumptions as to induce the belief that it would be most likely that the plaintiff would examine the certificate before purchasing. That would depend on many things—among others the business habits of the man, and his convenient opportunity. The paper itself, if seen, would hardly, if in proper form, have held out any peculiarly lively inducements to buy. A much greater probability is that the plaintiff purchased the oil stock because such stocks were just then in great demand. In fact that is the only inference that can reasonably be drawn from the testimony of Riddle, his vendor. This shows that he simply wanted oil stock, and he sold him the stock, with some others', without inquiry by him in regard to the character of the company, or how its shares were going in market, or any representation in regard to it whatever. As he asked for Hubert oil stock, and not for Olive Branch, it does not appear that he knew of the existence of that company until that moment. He bought without inquiry. These facts show that the presumption of examination of the organization by plaintiff, if otherwise good for anything, would in this instance be very unreliable. But on this point it is well settled that the representations which will entitle a party to recover on the ground of a deceit must be both false and fraudulent, and such as to induce and did induce the plaintiff to part with his money: *Huber v. Wilson*, 11 Harris, 178; *Harris v. Tyson*, 12 Id. 347.

Nothing like that was shown.

It is not intended to deny that a false and fraudulent advertisement, prospectus or label, instances of which have been given, may not be such representations as may be the foundation of an action of deceit; but I do not believe that it has ever been held that a party may recover as for a deceit practiced alone by such means, without it having been shown that he had seen the fraudulent instruments. The notice that our brother, SHARSWOOD, took of the cases on this point in his opinion in deciding the reserved question, however, is a sufficient vindication of this position. In such cases the instrument must not only be fraudulent in its representations, but

intended to defraud the plaintiff, or the plaintiff and all others, in order to be the foundation of such an action as this. Testimony to this extent was entirely wanting in this case.

The other reserved question was sufficiently dealt with in the opinion of the learned president of the district court. If the defendants, acting as agents for the corporation, purchased land at one price, and transferred it for a greater to the company, this was a fraud on the company which it alone could redress. The allegation and proof of a purchase of the realty by the defendants at \$12,500 in cash, and \$3,000 worth of stock, would not advance the plaintiff's case. He did not connect his loss with this act, but with another cause, viz.: that the land was not oil territory—had no oil on it. It was not on account of the realty, as such, he bought the stock, but because he presumed its product would make it valuable. In that he was mistaken. He is entitled to his proportion of the capital, and this he must get from the company. It must collect whatever is due to it, or has been wrongfully taken from it, in order to make distribution in winding up. If it can sue for this alleged fraud of its agents, the plaintiff can not, and that it can admits of no doubt, and needs no authority to prove. Perhaps we ought to say that Mr. McMurray, one of the above named defendants, was acquitted below of all blame, and any remarks in regard to the alleged fraud on the company by others of the defendants do not apply to him, nor do we say there was intentional fraud on the part of the others; but if the facts are as stated, their acts operated as a fraud. Seeing nothing to correct, the judgment of the district court is affirmed.

BABCOCK V. CASE.

(61 Pennsylvania State, 427. Supreme Court, 1869.)

Misrepresentation of title. Babcock held a treasurer's deed, and represented to Case that he had examined the title and found all right and that the title was good; Case saying that he would take Babcock's word for it, bought the land without examination. *Held*, that there was a relation of trust and confidence, and Babcock was bound to exhibit the truth as it existed.

¹ Ignorance no defense to party assuming to have knowledge. Babcock's

¹ *Leonard v. Peebles*, 6 M. R. 538.

ignorance of the facts, he having undertaken to state them truly, would not redeem a falsehood in any material matter from being a fraud that would avoid the contract.

Tender of re-conveyance. As a general rule, where there is an executed contract, to recover back the purchase money on the ground of a defect of title, an action can not be maintained without the tendering of a re-conveyance. Rescission on the ground of fraud, failure of consideration, etc., is a right in equity to a restoration of the consideration, and the party claiming the restoration must return the property attained or re-convey the title.

¹ **No tender required of worthless consideration.** If the thing, the consideration of which is sought to be recovered back, be entirely worthless, there is no duty to return it.

² **Pennsylvania practice—Tender after trial.** A condition in the verdict to re-convey would do equity. After verdict, if it appear that a re-conveyance ought to be made, the court can restrain execution until it be made.

March 23, 1870. Before THOMPSON, C. J., READ, AGNEW and WILLIAMS, JJ.: SHARSWOOD, J., at *Nisi Prius*.

Error to the Court of Common Pleas of Warren County. No 108, to January term, 1869.

This was an action of assumpsit, brought March 21, 1867, by Howard J. Case against Jerome Babcock, to recover the sum of \$500, being the consideration paid by the plaintiff to the defendant for land for which the defendant had no title.

The case was tried below, September 18, 1868, before JOHN-SON, P. J.

The plaintiff gave in evidence a deed from the treasurer of Warren county, dated June 11, 1860, to P. Falconer, for 130 acres of land in Deerfield township, "tract No. 164," sold for taxes; assignment January 23, 1865, indorsed, Falconer to plaintiff for one half the tract "for a valuable consideration." The plaintiff gave evidence that the land was seated and that no title passed by the treasurer's sale. The amount of consideration paid was \$500. The defendant resided about thirty-five miles from the land.

L. D. Elsworth testified that the defendant came to plaintiff's store in the winter of 1865 and proposed to sell him one half of the tract, which he said had been sold for taxes. Plaintiff asked if it was a good title. Defendant said he had

¹ *Approved Burns v. McCabe*, 7 M. R. 9; *Gifford v. Carvill*, 6 M. R. 558.

² *Beddington v. Henry*, 3 M. R. 32.

been to Tideoute, had hunted up the title and found it all right.

Frank Case, who was present at the same interview, testified in the same manner, and also that the plaintiff said to the defendant that he would have to take the plaintiff's word for it.

J. Haggarty testified substantially as Case.

R. H. Morrison, who lived at Tideoute, testified that in the winter of 1865 the defendant came to him to learn about the land; said he had a treasurer's deed for it. Witness showed him that the land was seated, and that he could not have a good title.

The defendant gave evidence tending to show that the plaintiff expressly took the risk of the title; that the defendant was ignorant of the state of the title, etc.

He also made the following offers of evidence, which were objected to by the plaintiff, rejected by the court and several bills of exception sealed:—

1. That after plaintiff had the same knowledge of the facts relating to the sale of the land and its situation as the defendant had, he still retained the title and endeavored to sell the same, refusing larger offers than he had paid for it.

2. That the land in question was known as oil land, and as such its current value at the time of the sale from defendant to the plaintiff, with a good and indisputable title, would have been more than ten times the price paid by plaintiff to defendant for the same.

3. That plaintiff said that in the summer of 1865 he had the land in question in the New York market, and could sell it for \$50,000, if he could make an indisputable title for it.

The defendant submitted the following points:—

1. After plaintiff had an opportunity to discover the defects in the title, then it was his duty to tender the re-conveyance of the land to defendant and rescind the contract, and, so far as he reasonably could, place the parties *in statu quo* before bringing suit for the purchase money, and not having done so up to the bringing of this suit, he has affirmed the sale, even though originally tainted with fraud.

2. That to sustain an action under the pleadings and facts in this case, it was necessary for plaintiff to tender to defendant a re-conveyance of the land prior to commencing suit.

3. The treasurer's deed to Patrick Falconer being based on the assessments and records in the office of the county commissioners, which were equally accessible to both plaintiff and defendant, the same was notice to plaintiff of any defects in the title as indicated by said assessments and records, unless the defendant made a statement as to the same which was not true, and plaintiff accepted and acted on such statement as true, and was prejudiced thereby.

The court answered:—

“The 1st and 2d points are answered in the negative.

“The 3d point states the law correctly as an abstract proposition, but it is not in regard to the title, or anything good or bad exhibited by the records, that is the subject of complaint. It was the want of land, not the want of a regular title.”

The court, after referring to the facts and commenting on them, further charged:

* * “So far the record and facts were calculated to mislead.

“The question then is, did the defendant afterward and otherwise learn that he had been deceived and got what was of no value, and then to retrieve himself from the dilemma go and impose it on the plaintiff as a valuable thing?

“The only evidence of the time and manner in which Babcock acquired such information is given by Esquire Morrison, and contained in the declaration of Babcock, as proved by the plaintiff's witnesses. You will therefore have to examine closely the testimony of Esquire Morrison, and judge whether it proves to your satisfaction that the defendant was then and there apprised and made fully aware that he had no land. You have also some declarations of the defendant, as to the examinations he had made into the validity of his title. You must judge from all this whether the defendant was aware, either by his examinations of Esquire Morrison and the assessments, or from any other source, that his title was worthless, and whether he withheld his knowledge of the facts thus acquired, and by a representation of a title, fair on its face, or direct verbal representations that he had examined or hunted it up and found it all right, induced the plaintiff to purchase and pay his money for what was worthless; and if so, the plaintiff would be entitled to recover back his money and interest upon it. Ignorance is a good excuse against a charge

of fraud in a case like this, if you are satisfied the defendant acted ignorantly and not dishonestly and falsely.

"Then again, if the plaintiff knew the facts, as well as the defendant, and was buying the land with the hope of being able, during that period of excitement, to sell it to some speculator at an advance on his purchase, and thus knowing the facts, agreed to take the title at his own risk, then the plaintiff ought not to recover anything.

"You must judge of the credibility of the witnesses, and reconcile the whole if possible."

The verdict, September 20, 1868, was for the plaintiff for \$609.17.

The defendant took a writ of error. His assignments of error were the rejection of his offers of evidence and the answers to his points.

L. D. WETMORE, with whom were WILBUR and ALLEN, for the plaintiff in error. The contract was voidable, not void, and if Case wished to rescind it he should have given Babcock notice as soon as he found the defects: *Pearsoll v. Chapin*, 8 Wright, 14. The deed to Babcock being a treasurer's deed and assigned to Case, pointed him to the time by which he could ascertain there was no title, it was therefore his own folly to take it: *Keer v. Kitchen*, 7 Barr, 486; *Hill v. Epley*, 7 Casey, 336; *Hood v. Fahnestock*, 1 Barr, 474; 1 Story's Eq. § 197, n. 3; *Crest v. Jack*, 3 Watts, 240; *Knouff v. Thompson*, 4 Harris, 364; *Kintzing v. McElrath*, 5 Barr, 469.

R. BROWN, for defendant in error, cited *Flynn v. Allen*, 7 P F. Smith, 482.

The opinion of the court was delivered May 12, 1869, by THOMPSON, C. J.

The plaintiff in error, Babcock, sold the land which gave rise to this controversy to the defendant in error, at the distance of some thirty-five or forty miles from its alleged location. There was testimony to show that he represented the title as good; that it was a tax title; that he had bought from Mr. Falconer, and had been to Tideoute, where the land lay, and looked it up and found it all right. Of course this was equivalent to saying that the land was unseated and subject to be sold for

taxes at the time the taxes for which it was sold had been last assessed. There was also testimony that the defendant in error said if he bought the land he would have to take his (Babcock's) word for it, that the land and title were as he represented, and that on these terms the sale took place. The jury believed this evidence, and found against the defendant below on the ground that he misrepresented the true state of the land, when he was bound in good faith to represent it exactly as it was, the plaintiff below declaring himself a stranger to it, and relying on his representations. Under such a state of facts, there was a relation of trust and confidence between the parties, and the seller was bound to exhibit the truth of the case as it existed, whether he knew them or not. That is to say, his ignorance of them, having undertaken truly to state them would not redeem a falsehood in regard to them in any material matter, from being a fraud, and a fraud that would avoid the contract. All this was sufficiently explained to the jury by the learned judge below.

The plaintiff's case below depended on showing the worthlessness of the defendant's conveyance. This he succeeded in doing. But it is alleged that the plaintiff was not entitled to try that question until after a reconveyance made or tendered to the defendant.

As a general rule, in the cases of executed contracts, this is true. Rescission on the ground of fraud, failure of consideration and the like, is a right in equity subject to a restoration of the consideration; consequently, in order to obtain equity, it lies on the party seeking it, to do equity; that is to say, he must return the property obtained, or reconvey the title. If this be the equitable requirement, a failure in that particular would ordinarily be followed by a denial of the equity demanded. But if the thing, the consideration for which is sought to be recovered back, be entirely worthless, there would be no duty to return it. This we held in *Flynn v. Allen*, a case from Potter county, 7 P. F. Smith, 482. We decided that the return of the worthless township orders bought by the plaintiff from the defendants, was not essential to the plaintiff's right of recovery. As nobody can have an equity in a thing worthless in itself, it must follow that the restoration of such a thing will not be required in equity.

Wherever the question of restoration arises, it is an equitable question, and is to be dealt with on equitable principles. If there be no value in a conveyance, for instance, and no right of recourse on any one on a reconveyance, would the want of such a reconveyance having been tendered outweigh a plaintiff's equity to have his money back, who had been egregiously defrauded? If it would not, a reconveyance would not be required. It is only required in order to prevent the party holding the thing paid for, and recovering the price, also, that a return is essential in equity. If the thing be worth nothing, of what consequence is a reconveyance or return of it?

The defendant below did not show that a reconveyance by the plaintiff to him would be of any value. What equity had he to have it therefore? It must be remembered that if the plaintiff was defrauded, it avoided the conveyance, and his right was complete to his money. It never lawfully passed out of him. The right to have it again depended on what might appear in the defense. He could not know that the defendant would insist on a reconveyance of a worthless title, and was not bound to make a reconveyance, or tender one. If any value appeared in it, however, a condition to reconvey in the verdict, would effectually do equity in the premises. Indeed, after verdict, if it should come to light that a reconveyance ought to be made, it is within the equitable power of the court to restrain execution until it be made. In all cases, therefore, the equity of the defendant is to be judged of and administered, if it be an equity at all, and if it be not, the claim goes for nothing. If equity requires a reconveyance to precede suit, it will be so administered; if it can be protected on the trial as it may in almost every possible case, it will be so administered. If there be no equity in the case, but only an assumption of it, it ought to be disregarded. That was the category, it seems to us, in which the defendant's claim to equity stood. Should the court below be of opinion, however, that justice demands a reconveyance to be made to the defendant, it might restrain the execution until it be made.

The action is at common law, but still it is an equitable action; contemplating it in this light, the rights and duties

of the parties are more easily perceived, and as they strike us, we have stated them. We do not impinge on the case of *Pearsoll v. Chapin*, 8 Wright, 12. That case was well decided on its facts. We think there was, therefore, no error in the ruling of the learned judge upon the defendant's 1st and 2d points.

Nor do we consider there was error in the answer to the third point of the defendant. It was true in law, if the facts were so, that if there was no land unseated to which the treasurer's deed was applicable, the conveyance may have been regular, but it operated on nothing. The court committed no error in telling the jury so. It was their business to say how the fact was, and they have said so. The other branch of the point was affirmed.

There are several errors to which no arguments were addressed, but we have considered them, as requested in the oral argument, and see nothing whatever to correct in the rulings of the learned judge in regard to them.

It was proposed to prove on the part of the defendant that the price at which the land was sold, was so inadequate to its value, if oil territory, that an inference ought to have been drawn by the jury, that the plaintiff took the risk of the title. Such was by no means a legitimate inference. It was not known to be oil territory, and the risk of this may have been the inducement to offer it at so low a figure. The testimony would be ineffectual unless it would raise a presumption contrary to the express facts, and sufficient to overturn them as proved by the witnesses, that the defendant represented the title as good, and he knew it, and that the plaintiff said he would rely on his word and take it. The proposed testimony was susceptible of other inferences, and not necessarily those claimed; in fact not possible, in view of the evidence in the case. There was no error, therefore, in this, nor in any other part of the case, and the judgment is affirmed.

REESE RIVER SILVER MINING CO. V. ATWELL.

(Law Reports, 7 Eq. 347. Before the Master of the Rolls, 1869.)

¹ **Deed intended to hinder creditors.** A mining company being about to obtain judgment against one of its directors, he made conveyance of all his assets to a third party. *Held*, that the deed was intended to delay, hinder or defraud creditors; (2) that it was not necessary for the company to have a lien or charging order to induce the court to set it aside; (3) but that in the absence of such claim the court could merely set aside the conveyance without distributing the assets.

The Reese River Silver Mining Company, limited, was incorporated in June, 1865, under the provisions of the Companies Act, 1862. Peter Aaris was the promoter of the company and Joseph Atwell was the chairman and one of the directors. In 1865 a sum of £6,000 was, by the authority of Joseph Atwell and Sidney Edward Clarke and Capel Coape, two of his co-directors, paid to Peter Aaris out of the company's funds. On the 28th of May, 1866, the company was ordered to be wound up. On the 23d of January, 1867, the official liquidator took out a summons that an examination might be directed into the conduct of Joseph Atwell and his co-directors with reference to the payment by them of the sum of £6,000 to Peter Aaris, and that they might be ordered to refund and repay to the assets of the company the said sum of £6,000, together with interest thereon at 5 per cent. The summons was returned for hearing before the chief clerk of the master of the rolls, on the 5th of February, 1867, and after repeated adjournments for the purpose of completing the evidence, was ultimately adjourned into court, and came on to be heard on the 1st and 6th of May, 1867. On the latter of these days, the master of the rolls made an order that Joseph Atwell, Sidney Edward Clarke and Capel Coape should, on or before the last seal in the sittings after Trinity term, 1867, pay the sum of £6,000 into court. No part of the £6,000 was paid into court; and on the 2d of November, 1867, it was ordered that Joseph Atwell should, on or before the 20th of December, 1867, pay the sum of £6,000 to the official liquidator. No payment

¹ *Coons v. Tome*, 9 Fed. 532; *Burdsall v. Waggoner*, 4 Colo. 256.

was made by Atwell in pursuance of this order, and Clarke and Coape were in insolvent circumstances.

On the 13th of February, 1867, Joseph Atwell granted a voluntary settlement of the following property: (1) a sum of £2,000, part of a sum of £3,000, secured by mortgage on certain hereditaments in the county of Wexford, Ireland; (2) 1,000 shares in the Queen's Hotel Company, Hastings, limited; (3) a sum of £800, secured by certain bonds of the Victoria government; (4) a policy of insurance on his own life for the sum of £479 5s.; (5) a leasehold messuage, No. 72 Bedford Gardens, Kensington, contracted to be purchased by him from Wellington Purdon, and then in the occupation of him, Joseph Atwell; and (6) a debt of £156 17s., owing to him from the Sweadale Mining Company. The trustees were Gregory Haines Atwell, a son of Joseph Atwell, and Wellington Purdon, and the trusts were declared to be, during the life of Joseph Atwell, to pay to him such part of the income of the trust property as the trustees might think fit, and also to permit him, if they should think fit, to reside in the said house, and after his death to convert the trust property into money, and to stand possessed of the sum of £500, part thereof, upon certain trusts, for the benefit of Catharine Atwell; and as to the residue, to stand possessed of one moiety thereof for Gregory Haines Atwell absolutely, and to invest the other moiety and apply the income thereof for the support, maintenance and benefit of William Quin Atwell, during his life, and after his decease, to stand possessed thereof upon trust for Gregory Haines Atwell, absolutely.

The bill was filed by the company and the official liquidator, for the purpose of setting aside this settlement, as having been contrived by Joseph Atwell, for the purpose of delaying, hindering and defrauding the plaintiffs of their just and lawful claims; and it prayed for a declaration that the settlement was fraudulent and void, as against the plaintiffs, and for the delivery up and cancellation thereof; for an account of the income of the trust property received by the trustees; for a declaration that such income and the whole of the trust property were liable to make good what was due to the plaintiffs; and for a sale of the trust property, and other consequential relief.

Joseph Atwell, by his answer, admitted that the settlement comprised the whole of the property to which he was entitled, at the date thereof, with an insignificant exception.

The cause now came on to be heard. No attempt had been made to enforce the order of the 2d of November, 1867, nor was there any evidence to show that Joseph Atwell was insolvent.

Atwell deposed that his object in executing the settlement was to make a provision for his son, William Quin Atwell, who was of unsound mind, and unable to provide for himself, and for his granddaughter, Catharine Atwell, an orphan, and only six years of age.

LORD ROMILLY, M. R.

I am clearly of opinion that this deed comes within the 13 Eliz. C. 5, and that it was executed in order "to delay, hinder and defraud creditors of their just and lawful actions, suits, debts, accounts and damages." I am of opinion, as I was in *Burling v. Bishopp*, 29 Beav. 417, that where a man knows that a decision is about to be pronounced against him, and thereupon settles all his property, this comes within the exact words of the statute of Elizabeth, and that the court will set it aside for the benefit of his creditors.

Now in this case the settler, Joseph Atwell, was the chairman of the Reese River company. On the 23d of January, 1867, the official liquidator took out a summons for an examination into his conduct with respect to certain matters. Upon this no doubt, Atwell consulted some legal adviser, and probably was advised that an investigation would certainly take place. Thereupon, not unnaturally, he desired to make a settlement of his property, and on the 13th of February he executed this deed. The order against him was made on the 6th of May. I am clearly of opinion that as soon as he saw that the matter would be investigated and that he could not resist the order, he conveyed away all his property for the benefit of his children, reserving power for the trustees to pay him such part of the income as they might think fit. I think that this is clearly void, having been done in anticipation of the order that was about to be made against him.

I am also of opinion, that no lien or charging order on the property is necessary to entitle the plaintiffs to sue. The point was put with much confidence by Mr. Jessel, but neither he nor Mr. Caldecott, who has shown much diligence in examining the cases, has cited any authority; and it appears that the same point was taken and overruled in *Goldsmith v. Russell*, 5 D. M. & G. 547. I have little doubt that what was passing in Mr. Jessel's mind was the rule that the court will not give equitable execution until the creditor has put himself in a position to obtain execution at law, in which case there is no question of the statute at all. But as soon as the court finds that a deed has been executed for the purpose of delaying, hindering or defrauding creditors, and that it comes within the statute it sets the deed aside, but it goes no further and the plaintiffs must take some independent proceedings if they wish to have execution against the property in this deed. I shall give leave to amend, by making the bill on behalf of all creditors of Joseph Atwell. I shall declare that the deed of the 13th of February, 1867, is fraudulent and void as against the creditors; and I direct the trustees to do and concur in all acts necessary for making the trust property available to the creditors; and there will be no order as to costs, except that the liquidator is to have his out of the assets of the company.

Solicitor for the plaintiffs, Mr. T. E. HARPER.

Solicitor for the defendants, Mr. BROOK.

SHORT V. STEVENSON.

(63 Pennsylvania State, 95. Supreme Court, 1869.)

¹ **Organizer making profit on purchase.** Stevenson being in negotiation for oil land proposed to form a company, represented that the land could be bought for \$12,000, and induced Short to take and pay for a share in it at \$1,000. Stevenson bought the land for \$6,000. *Held*, that on these facts Short could recover the \$1,000 which he had paid.

¹ *Collins v. Case*, 1 M. R. 91; *Cumberland Co. v. Sherman*, 1 M. R. 322.

Good faith required between associates. If Stevenson had disclosed the sum for which the land could be bought, and which he paid, and refused to sell for less than at the rate of \$12,000, the transaction would have been unimpeachable; but good faith required that he should charge his associates no more for their respective shares than the amount which he paid for them.

November 2, 1869. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Allegheny County, No. 2: to October and November Term, 1869.

This was an action of assumpsit by Marshall Short against Philip H. Stevenson, commenced July 18, 1867.

The plaintiff declared in one count, that the defendant represented to him that he was about to buy 15 acres of land for \$12,000; that the Stevenson & Smith's Ferry Oil Company were organizing for taking oil from the land, and the defendant would buy the land for the company at \$12,000, and in consideration of the payment by plaintiff of \$1,000, defendant agreed to give him one-twelfth interest in the land; plaintiff averred that the defendant had paid but \$6,000 for the land, and he therefore became liable to pay plaintiff \$1,000.

The second count set out as in the first, and averred that the defendant promised that whenever the plaintiff should become dissatisfied, the defendant would repay him the \$1,000, and that the plaintiff having discovered that the defendant had paid but \$6,000 became dissatisfied and demanded the repayment of the \$1,000.

The declaration contained also the common counts.

The plaintiff gave evidence by Levi Stevenson that in June, 1865, the defendant told the plaintiff that a tract of oil land containing 15 acres, near Smith's Ferry, could be bought for \$12,000, and wished some good men to go in at \$1,000 per share. Short then agreed to take a share and put his name down.

J. McNall testified that he was present at a meeting, August 5, 1865; the defendant showed a deed for the property, stating the consideration to be \$12,000; defendant said the matter was all right; witness said the deed showed \$12,000 had been paid for the property; Stevenson made no reply.

J. Dougherty, the vendor of the land, testified that in April and May, 1865, Stevenson came to him to buy the land, and not then buying it, came two or three times afterwards; the land was sold to him about the last of July or the 1st of August, for \$6,000; defendant paid for stamps for \$12,000.

There was evidence for the plaintiff that the defendant had promised the plaintiff to refund the \$1,000 if he became dissatisfied.

The plaintiff gave in evidence two receipts to him from the defendant for the payment in full of his share in the oil company.

The plaintiff having closed, the court (Stowe, J.) directed a nonsuit, which the court in banc refused to take off. This on the removal of the case to the Supreme Court by the plaintiff, was assigned for error.

COLLIER, MILLER & McBRIDE, for the plaintiff in error, cited *Simons v. The Vulcan Oil Co.*, 11 P. F. Smith, 202.

T. M. MARSHALL and T. B. HAMILTON, for defendant in error, referred to *McElhenny's Appeal*, 11 P. F. Smith, 188; *Simons v. Vulcan Oil Co.*, Id. 202.

The opinion of the court was delivered January 24, 1870, by WILLIAMS, J.

We are clearly of the opinion that this case should have been submitted to the jury, and that the court erred in withdrawing it from them by ordering a judgment of nonsuit and refusing to set it aside.

The evidence shows that the plaintiff subscribed for a share in the Stevenson & Smith's Ferry Oil Company, of which the defendant was a promoter; that, when he made the subscription, the defendant was not the owner of the land on which it was proposed to carry on the operations of the projected company, but represented that it could be bought for \$12,000; and, on the faith of this representation, the plaintiff subscribed and agreed to pay, for one share, the sum of \$1,000—the whole number of shares being twelve, at \$1,000 each—and that he paid one half of the amount subscribed before the defendant bought the land; and that, when he paid the resi-

due, the defendant exhibited a deed for the land, which he had in the meantime procured, showing the consideration therefor to be \$12,000, and said that the matter was all right. Instead of paying \$12,000 for the land, as represented, the defendant, as the deposition of Dougherty the vendor shows, paid only \$6,000 for it. If he had disclosed the exact sum for which the land could be bought, and which he actually paid for it, and had refused to sell to his associates for less than double the amount which he paid, and the plaintiff had subscribed, and agreed to pay \$1,000 for the share with a full knowledge of all the facts, the transaction would have been unimpeachable, and the defendant might have pocketed the profits without any liability to account therefor. But he made no such disclosure. He was not the owner of the land, and he did not buy it for himself alone, but for himself and his associates, and good faith required that he should deal fairly with them, and charge them no more for their respective shares than the amount actually paid therefor. As was said by the present Chief Justice, in the recent case of *Simons et al. v. Vulcan Oil Company*, 11 P. F. Smith 202,—“An agent can not make profits out of his principal in the business of his agency; nor a partner out of his copartner, without his assent; nor an associate out of his co-associates, for whom he has undertaken to act. That this is the law, authorities need not be required to prove. It is elementary.” The principle applies with all its force to the facts as proved in this case, and the evidence should have been submitted to the jury, with the instruction that, if they found that the defendant purchased the land for himself and associates without disclosing the price paid therefor, and was guilty of concealment and misrepresentation as to the terms of the purchase, the plaintiff was entitled to recover back the advance price which he paid the defendant for his share.

Judgment reversed, and a procedendo awarded.

¹SIMONS ET AL. V. THE VULCAN OIL AND MINING CO.

(61 Pennsylvania State, 202. Supreme Court, 1869.)

Organizers, acting as corporate agents, can not take profit against the company. Parties purchased oil land, and shortly afterwards with others formed a corporation to whom the land was conveyed at an advance. If the purchasers acted as agents of the company in purchasing the land, they could not charge a profit against their principal. They would be in the same position if they assumed so to act without precedent authority, if their doings were accepted as the acts of agents by the company.

²**Representations to stock buyers, as to original cost.** If in order to get up a company they represented themselves as having acted for one to be formed, proposed to sell at the prices they had paid, and their purchases were taken and stockholders invested on these representations, it was a fraud on those interested to allow them to retain profits paid them by the company in ignorance of the sums advanced. If they had disclosed the exact sum paid for the land, and had refused to sell except at an advance which was paid them, they would have a right to retain the profits.

Action, in form *ex contractu*, based on fraud. Where parties have so acted, an action in form *ex contractu* can be maintained, only by showing fraud in dealing with the company, by reason of which they should not *ex æquo et bono*, retain the moneys wrongfully obtained from it.

Latitude of evidence. In investigations as to fraud great latitude of inquiry is always allowable.

³**Evidence, after conspiracy proved.** There being evidence that the purchase and sale of land was the combined act of two parties, the publishing of a prospectus, advertisement, etc., by one was evidence against both.

Practice, where erroneous testimony is admitted by mistake. The refusal to strike out the evidence of a witness afterward ascertained to be interested, is not assignable for error. It is to be corrected by a request to charge that the evidence be disregarded.

Testimony has no venue. Declarations of the parties, if relevant, are admissible, no matter where made.

"Original owner." A prospectus of an oil company stated that the company had purchased their land from the "original owner." *Held*, that this was not a term of art, to be explained by experts. The term implied that no profits were added to the price paid by the company on account of an intermediate buyer, etc., and excluded the idea of a purchase at speculative prices.

¹ Cited *Burns v. McCabe*, 7 M. R. 9; *Short v. Stevenson*, 6 M. R. 631.

² *Denmore Co. v. Denmore*, 3 M. R. 569.

³ *Page v. Parker*, 6 M. R. 544.

¹**Directors making profit out of company.** Agents, partners or associates can not make profit out of their principals, co-partners or co-associates, for whom they have undertaken to act. Directors are but the agents of the company, and have power to act only for the interest of the company, not against it.

Relation of corporation to its officers. The shareholders constitute the company, and the acts of the directors can be inquired into at their instance. A fraud against a corporation by any or all of the directors, may be redressed by an action in the name of the corporation.

Joint action. The action being joint, it was necessary to prove that the money had been received by both defendants.

Payment to agent. The receipt of money by an agent is *prima facie* evidence of the receipt by a principal; and the receipt by one partner that it is for the firm.

Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the District Court of Philadelphia, January term, 1869.

This was an action of assumpsit brought, December 9, 1865, by The Vulcan Oil and Mining Company against Henry Simons and William H. Weeks. The declaration was in the common counts. The plaintiffs' bill of particulars was in substance as follows: Before December, 1864, the defendants began measures for the incorporation of a company, under the Act of July 18th, 1863, for incorporating companies for mining and other purposes, and had articles, *dated* December 5, 1864, drawn up and signed by themselves and others. A meeting of the corporators was held December 3, 1864, at which Simons was elected president, and Weeks, treasurer. Having taken the preliminary steps required by the act, the plaintiffs were duly incorporated.

"The defendants, after they began to organize the company, or shortly before they so began, but with a view to the company and for it, acting first as corporators with others, and subsequently as officers of said company, negotiated for, secured and received conveyances of certain tracts of land," viz.: In or about December, 1864, from John Brown three tracts of land in Virginia of 1,000 acres each; about the 28th of same month a tract from George W. Grier in Bedford county, Pennsylvania, of 50 acres; and about January, 1865,

¹ *Ahl's App.*, 3 M. R. 639.

a tract from George F. Morgan of 102 acres in Wirt county, Virginia. The conveyances were all made to Simons. The defendants repeatedly declared, both to the other officers and stockholders of the company, that they had bought these lands for the company from original owners; that the prices paid by the company were those paid to the original owners, and were low. The plaintiffs averred that these representations were false and fraudulent; that the conveyance from Brown recited a consideration of \$50,000—whereas but \$3,000 had been paid to Brown; the conveyance from Morgan recited the consideration of \$31,000—whereas they had paid something less than \$7,000. On the 23d of January, 1865, they conveyed the Brown tracts to the company for \$50,000, and on the 24th of February conveyed the Morgan tract to the company for \$31,000, and the consideration, \$81,000, was paid to them by the company. The action was brought to recover the difference between the prices paid by the defendants and those paid to them by the company, which it was alleged amounted to about \$75,000. The defendants severed in their pleas, each pleading the general issue, etc.

On the trial before HARE, P. J., the plaintiffs gave in evidence articles of association of the defendants and J. L. Willoughby, Dr. Alfred Weeks and E. Benson Cox, dated December 5, 1864, and signed by all of them, associating themselves under the Act of July 18, 1863, mentioned in the bill of particulars, by the name of the Vulcan Oil and Mining Company, for the purpose of carrying on mining for coal, ochre and oil on the lands described in an accompanying schedule (being those mentioned in the bill of particulars), the office for business and meetings to be in Philadelphia, the capital to be \$200,000, in shares of \$1 each. The schedule is signed by the same persons. The acknowledgment was by the same persons before Alderman McCahen, January 4, 1865. Also certificate to the auditor general, dated January 5, 1865, certifying the same facts as in the articles; and in addition, "the amount of capital already paid in is \$200,000." Appended to the certificate is this affidavit:

" Henry Simons, William H. Weeks and J. L. Willoughby, being duly sworn and affirmed according to law, do depose and say, that pursuant to a notice signed by J. L. Willoughby

one of the parties to the original agreement, stating the time, place and purpose of the meeting, a copy of which was given to each member at least three weeks previously, a meeting of the said Vulcan Oil and Mining Company was duly called and held on the 31st of December, A. D. 1864, when and where the said Henry Simons was duly elected president and the said William H. Weeks was duly elected treasurer and the said Henry Simons, William H. Weeks and J. L. Willoughby were duly elected a board of directors. They further depose and say that all the facts set forth in the above and foregoing certificate are just and true, and that the schedule hereunto annexed, marked 'A', is a description of the lands of the said company to the best of their knowledge and belief."

Also evidence of a meeting of the incorporators held December 31st, 1864, at which the corporate name was fixed, and Simons, Willoughby and Weeks were elected directors, Weeks elected treasurer and J. P. Brosius elected secretary.

Also the letters patent of the incorporation, dated January 13th, 1865; also the deeds from Brown to Simons, dated October 8th, 1864, the consideration for the 2,000 acres stated to be \$30,000; for the 1,000 acres \$20,000; from Grier to Simons, dated December 28th, 1864, consideration stated to be \$500; and from Morgan to Simons dated January 24, 1865, consideration stated to be \$31,000. Each of these deeds had revenue stamps of amounts corresponding with the consideration stated in the deed. Also deeds dated January 23, 1865, from Simons to the plaintiffs for the Brown and Grier tracts; and deed of Feb. 24, from Brown to the plaintiffs, for the Grier tract. The considerations in the deeds to the plaintiffs were the same respectively as in those to Simons.

The plaintiffs then offered in evidence a prospectus of the "Vulcan Oil and Mining Company of West Virginia," published November 17, 1864, in the Sunday Dispatch, a paper of Philadelphia, accompanying it with the receipt for its insertion from the proprietors of the paper and the testimony of Brosius, the secretary, that this receipt passed into his hands with other papers of the company delivered to him by Weeks. The offer was objected to by the defendant, admitted by the court, and a bill of exceptions sealed. The prospectus was as follows:

"Vulcan Oil and Mining Company of West Virginia.

Negotiations now pending, will, in a few days, place this company in fee simple possession of the most successful oil territory in America.

The indications are that the Vulcan's wealth of oil will fully equal, if not surpass, the famed Columbia, now paying \$1,000,000 in cash dividends.

To those contemplating investments, we would state that a few advance subscriptions for stock not bespoken, may be obtained at original price, one dollar per share.

J. L. WILLOUGHBY, Secretary pro tem., 434 Walnut street."

Also prospectus published in Philadelphia Inquirer, December 17, 1864, headed, "The Vulcan Oil and Mining Company of West Virginia. Chartered by the State of Pennsylvania. Capital \$1,000,000. \$5 per share."

The prospectus contained a description of the lands before mentioned, viz.: the Virginia lands as "located in the heart center of the great oil district of West Virginia * * in the well known Burning Well and Great Kanawha Oil District."

"The company estates have been secured at really low prices (\$81,000 in all), and are deeded direct from original owners to the stockholders of the Vulcan Oil and Mining Company."

The prospectus concludes:

"Subscriptions to a limited amount of the stock (if not already taken), may be obtained at original price, \$1 per share.

"J. L. WILLOUGHBY, Secretary,

"No. 434 Walnut street.

"HENRY SIMONS, President."

This was objected to by the defendants, admitted by the court, and a bill of exceptions sealed.

The plaintiffs then gave in evidence a prospectus published in the Philadelphia Inquirer, January 5, 1867, headed:

"LOOK TO YOUR INTEREST.

"The Vulcan Oil and Mining Company of West Virginia.

"Chartered by the State of Pennsylvania. Capital \$200,000. \$1 per share, full paid."

The body of the prospectus is the same as that of Decem-

ber 17th. This prospectus is signed: "HENRY SIMONS, President, U. S. National Wagon Works. WM. H. WEEKS, Treasurer—of W. H. Weeks & Co., White Lead Manufacturers. J. L. WILLOUGHBY, Secretary, No. 434 Walnut street."

William Humphrey, a witness for plaintiff, testified that the defendant Weeks, on the 12th or 13th of November, desired him to go to Wirt county, Virginia, to ascertain if a tract of land which he and Simons were about to purchase were oil territory; witness reported the oil prospects to be good. Weeks told witness that there was an arrangement to purchase one of the tracts before he went down. The deed to Simons was drawn by the direction of both Simons and Weeks. Witness superintended the preparation of the deed, etc.; the consideration was inserted by the direction of Simons and Weeks, who instructed him as to the amount, but did not explain why that amount was to be inserted.

H. B. Kelly, testified for plaintiffs, that on the 13th of December, 1864, he advanced \$2,000 to one Hollis, to pay for four tracts in Fayette county, West Virginia, which Hollis had agreed to buy of R. Alsop and J. H. Waters. Four deeds for the lands were in blank from John Brown and wife, executed and dated October 8, 1864; between December 13th and 23d, 1864, he made a bargain with Weeks for two of these 1,000 acre tracts for \$1,000 each, the deeds for which were delivered on or about December 19th; a few days after Weeks bought and received a deed for the third 1,000 acre tract at the same price per acre. The deeds for the first two tracts were canceled and one executed by Brown in their stead; the substitution was made at Weeks' request; the one deed was executed in blank and thus delivered to Weeks; Simons' name was inserted afterward. The consideration also was left blank at Weeks' request; \$30,000 was afterward inserted. Witness asked Weeks what consideration was to be inserted; he replied, "Never mind that just now; I don't know." The last deed was dated back to correspond with the original deeds, so that the searches before made might cover the conveyance. When the deed for the third tract was handed by witness to Weeks, there was a blank for the grantee's name; witness did not recollect whether there was a blank for the consideration.

Under objection by the defendants, the court allowed

Brosius to testify that he had frequent conversations in January, 1865, with Weeks at the company's office, which was also Weeks' office, when Simons was not present, in relation to the purchase of the lands; witness said: "Persons often doubted my word, out of doors, whether the land was put in at cost. I asked him if he really made it for nothing; he said he had. I asked him once why he was so liberal as to make the transfer for nothing; he said he had bought land adjoining which would be increased in value." Witness, in consequence of these statements, told "people outside" that the land had been bought by the company at exactly what it had cost Weeks and Simons. For the admission of this testimony the court sealed a bill of exceptions.

Brosius testified that copies of the prospectus were lying about the company's office, and were circulated amongst persons who they wished should subscribe; Simons and Weeks were at the office frequently, Weeks the most so. He further testified that he had been a stockholder, but had sold all his stock a few days before the trial, to the president of the company for the purpose of becoming a witness. He gave much further testimony tending to support the issue on the part of the plaintiff. It afterward appeared that whilst Brosius was a stockholder, debts had been contracted by the company which were still unpaid, and it was doubtful whether the property of the company was sufficient to pay them.

The defendants asked the court to strike out Brosius' testimony, which was refused, and a bill of exceptions was sealed.

Jacob Amon, called by plaintiffs, stated on his *voir dire* that he was a stockholder in the "Government Oil Company"; that Simons had told him that the plaintiffs owed the Government company \$3,000 or \$4,000, which had been owing over a year, and no effort had been made to collect it. The defendants objected to the competency of the witness; the court admitted him to testify, and sealed a bill of exceptions. Witness then testified that in January, 1865, at the office of the company Weeks told him "the property was conveyed directly from the owners in Virginia, at the specified amounts stated in their advertisements, and conveyed directly from the parties in Virginia to the stockholders of the company." That afterward Simons came in and, upon witness' inquiring of him to

the same point, he assured witness that the statements made by Weeks were true, and that he would vouch for anything which Weeks might say on the subject.

There was evidence that \$8,500 were paid by the defendants for the Wirt county property, for which the plaintiffs paid \$31,000.

The plaintiffs read the affidavit of Weeks made under a warrant of arrest, November 11, 1865, in which he denied most of the material allegations made by the plaintiffs then and on this trial, but testified that the lands had been purchased by him for himself and Simons, and the deeds made to Simons with his knowledge and consent, nearly a month before the formation of the plaintiffs' company; that it was understood by the company and its stockholders what price was being paid, and that Simons was the owner of the land; that the profit he and Simons made was the difference between \$15,000 and \$81,000, the division of the profits was to be equal, and Simons had already received \$12,000 on account; that he and Simons bought the lands to make a profit of them. Weeks further stated "Mr. Simons, in the matter of the purchase, acted with me and I with him. In everything that I did, I did for both, and what he did, he did for both." The plaintiffs gave evidence, also, that the company had paid \$81,000 for the land; also evidence that stock to the amount of about \$125,000, including \$5,000 by each of the defendants, had been subscribed and paid for, and other evidence tending to sustain their part of the issue.

The defendants offered the depositions of Thomas P. Potts, and others who had experience, to prove the manner in which most of the oil companies were organized at the time of the organization of the Vulcan Oil Company, showing what the words "original owner" meant. The offer was objected to by the plaintiffs, rejected by the court, and a bill of exceptions sealed. The defendants examined Thomas J. Clayton, Esq., who testified that a few days before the 4th of January, 1865, Weeks brought him a deed of the land in Wirt county, and abstracts of title of the land in Kanawha, telling him that the property was about to be disposed of to an oil company; that the officers *pro tempore* of the company desired witness to prepare papers for a charter; they had held an informal meet-

ing; witness told Weeks and some of the officers that there would have to be notice of three weeks to each corporator; they were anxious to have the charter immediately, and witness suggested that a notice should be prepared, dated three weeks previously, and each party should accept service; witness prepared such notice dated December 7, 1864, calling a meeting for December 31st, and all the parties interested accepted service by writing appended to it; the papers were taken to Harrisburg at once and the charter obtained; the meeting was held December 31, 1864. Witness also testified that he disapproved of the prospectus of December 17, 1864, because the \$5 per share had not been fully paid, and directed another in which the shares should be stated at \$1 per share. He also gave testimony tending to show that it was known by the directors and company that the defendants were selling the land to them at a higher rate than they had given for it; that there was no concealment; he testified generally in answer to the plaintiffs' case. There was other evidence for defendants of the same character. They gave in evidence, for the purpose of showing that the purchase had been confirmed by the company, the minutes of a meeting of the directors, February 6, 1865, held after due notice, at which the proceedings of the meeting of December 31st were confirmed by resolution, and two additional directors elected; also minutes of a meeting held February 24th, the additional directors as well as the defendants being present, at which a statement of the finances was submitted, showing the payment of \$81,500 for the land, the amount of stock unsold \$9,545, and other items, making in the whole \$125,000; also minutes of other regular monthly meetings until August, at which statements of the finances were submitted to the directors.

The defendants submitted these points:

1. This action can be maintained only by proof that the lands were purchased by the company itself from the several parties owning them, and that, in making the purchase, Simons and Weeks were acting, not for themselves, but for the company, and as agents for the company.

2. The action can not be maintained unless the evidence shows that both the defendants were so acting, and if the jury

believe that such agency existed on the part of Weeks but not on the part of Simons, they must find for defendants.

3. This action can not be maintained by mere proof, if any such exists, that the acts or conduct of defendants were fraudulent or deceptive, or that they made untrue statements of the value, or of the character, of the lands, or of the title acquired in the same, or of the parties from whom they purchased the same. Facts such as these, if they exist, may be ground for another form of action, but can not sustain this case. In this action a recovery can only be had by proving that defendants were agents of plaintiffs in buying the land, and not purchasers for themselves of land, which they afterward sold to plaintiffs.

4. The land was put in at \$81,000, in the formation of the company, by the five original corporators; these five constituted and represented the company at that time, and by their acts bound the company. It is the clear and uncontradicted evidence of the case that these five corporators then constituted the whole company, and, representing it, purchased the land for the company, from Simons and Weeks, and made it the basis of their organization. In view of these facts, the verdict must be for defendants.

The court, after referring to the facts and stating some legal principles, proceeded:

"But it is also true, that when parties stand in a relation of trust and confidence, and the truth is withheld, although innocently and without an intention to deceive, the law will esteem the transaction void. The relation of principal and agent affords an instance of this rule, it being the duty of the agent to communicate the truth to his principal, and remove any false impression that may exist in the mind of the latter.

"But it is not the only instance; [the rule applies wherever there is a fiduciary relation, and is applicable in a case like the present, where two or more persons unite for the purpose of establishing an association, throwing the books open to the public, and inviting every one who thinks fit to come in and take part in an enterprise of profit, a common enterprise, where, if it is successful, all will reap the benefit.] [Persons who come forward in such a capacity, as corporators or otherwise, assume the duty of good faith; and all they do in the

prosecution of the enterprise, with a view to establish the company—although the company be not yet established—must be done with fidelity toward those for whom they profess to act, and who will subsequently be affected by their conduct. It makes no matter that the stockholders have not yet come in, if the acts of the corporators affect their interests, those acts must be done honestly; because the circumstance that they are absent increases rather than diminishes the obligation to be careful of the interest of persons who, from the nature of the case, can not take care of themselves. Just as an agent can not buy land, or buy anything else for his principal, and then turn it over to the principal at a higher rate than he himself paid, unless he acquaints the latter with the true state of the case; and will be still more clearly responsible if he employs any undue means to conceal from the principal that he is making a profit where none ought to be made. So corporators who, in establishing a company, invite third persons to subscribe, can not deal with that which is to be the property of the company in a way to make an illegitimate profit for themselves; and if they do so without disclosing the truth, the profit will be illegal, and the company entitled to compensation.] * * *

“In order to judge whether this title was acquired by the defendants for themselves or on behalf of the corporation, we must turn from the deeds to the acts and declarations of the parties in the relation in which they stood to the corporation, and see whether, looking at what they said and did, it does or does not appear that they bought the land in a way rendering it their duty to treat it as land bought for the company, and therefore to be transferred to the company at the price paid to the original owners, unless the contrary was agreed upon with a full knowledge of all the circumstances.

[“One material fact in evidence on this point is the advertisement published by the authority of the five corporators; and more particularly, as the plaintiffs contend, by the authority of the defendants, as being the persons principally active, and, as the event proved, chiefly interested in the business. In these advertisements the Vulcan Oil Company, which, though not yet formed, was spoken of as if it were already in existence, was said to be possessed in fee simple of

the most successful oil territory in the market of the very oil territories which had been purchased by Weeks in behalf of himself and the other defendant, Simons. These tracts were particularly set forth and referred to as belonging to the company, and as there is no evidence that the company ever owned any other land, the defendants rely upon this as showing that this land came to the hands of Messrs. Weeks and Simons, not as their individual property, but as the property of the company. The argument is, and certainly it is a fair argument, that if the representations of the defendants with regard to the ownership of the land were true, they could only be true in this: that Mr. Simons, in taking the title, took it not for himself, but as a corporator in behalf of the company, and virtually stood in the position of an agent or trustee.] * *

"There is another statement in these advertisements pointing in the same direction, which is, that these lands are spoken of as conveyed by the original owners to the company as a corporation. [It does not seem, giving any fair effect to the English language, that the defendant Simons would be spoken of as the original owner of land which he and the other defendant had just purchased from a prior owner, and which at the time when the first advertisement was published had not been conveyed by the grantor; and we have seen that he did not acquire title to the land in Wirt county until some weeks afterward. If, therefore, the declaration that the land was acquired by the company from the original owners was in good faith, the only plausible or reasonable interpretation that could be put upon it, by the other corporators to the stock, was that when the land was conveyed by the original owners to Simons, he took and held it in trust for the corporation.]

["There is other evidence tending to support the same conclusion; for when the first meeting of the corporators was held, the names of the defendants Simons and Weeks were entered upon the books as having advanced \$50,000 for the company. Now it is conceded that no such sum was paid by them at any time or in any way; and the only way in which the entry can be explained is by supposing that the \$50,000 which they did not pay, but which they were falsely described in the deed as having paid for the Kanawha lands, was represented and entered by them as money paid by them for the association. In

this sense, that is, if they bought the land for, or on behalf of the company, they might be said to have advanced \$50,000 for the use of the company; but it is not easy to see how this could be alleged with regard to them in any other sense.] It is true that when the books came to be more formally opened under the advice of Mr. Clayton, this entry was stricken out and another of a somewhat different character inserted; still it stands as declaratory of the intentions of the parties.

"But there is still another point: the consideration for the Kanawha land, though only \$3,000, was, by the direction of defendants, or one of them, described in the deed as being \$50,000, the sum at which it was subsequently conveyed to the company and paid for by them. [If the defendants stood relatively to the company in the position of persons who, having bought on their own account, might ask a higher price than they had given, it is not easy to see what fair motive there could have been for misrepresenting the consideration.] Because the defendants might have said, we bought these lands for ourselves with a view, indeed, of selling them to this association, but not for it; we have a right to ask what we please; and though we paid only \$3,000, will not sell for less than \$50,000. [Or in another aspect. If it was land bought for the company as a basis on which they were to be organized, the defendants could not claim more than they had given, and the insertion of a false consideration may be regarded as indicating that the defendants knew this, and therefore sought to conceal the truth.] * *

"This is the evidence, so far as there is evidence in the case, that these lands were in fact purchased by the defendants, ostensibly for the Vulcan Oil Company; and if they represented this to be so, if they held it out to the world as the true state of the case and induced persons to subscribe on the faith of their declarations; if they so dealt with the company and obtained their price, what their real purpose or object was is immaterial, because it is impossible to read the secret purposes of men, and in dealing with them we can only look to what they avow. [It is possible that their secret and avowed purpose were at variance with each other; their secret purpose was to buy the land for themselves as their own property, with a view of transferring it to the company at an advance;

their avowed purpose, to hold it as the property of the company with a view of obtaining subscribers for the stock; but unless that secret purpose was made known, it ought not to avail against the purpose which was proclaimed, and by which they were believed by others to be actuated.] * *

“Another point has been made in the course of the case, and it is this: That whatever cause of action might grow out of the insertion of a false consideration, and the failure to communicate the truth; out of the representation that the land had been bought as the property of the company, and the transfer of it to them at an advance in price, still if the other corporators were not in point of fact deceived, if they knew that the defendants meant to treat the land as their own, and to make an exorbitant profit out of the transaction, then under these circumstances there would be no right on the part of the corporators, or of the company who were their successors, to have redress for the wrong thus committed.

“It is no doubt as a general principle, true, that whatever be the grossness of the deceit practiced by one man on another, if in fact it does not deceive, if the party on whom the attempt is made knows the truth really, and is still willing to go on, he can not claim compensation for a wrong that was designed but not accomplished. But this can only be true where the party who assents will be the loser by the fraud, or where he is in a position to bind the parties on whom the loss will fall. It can not apply where he is bound to act in good faith to others and yet sanctions a fraud or imposition on them.

[“In order to know whether the assent of the other three corporators, Dr. Weeks, Mr. Willoughby and Mr. Cox, would—if given with a knowledge of what was going on—preclude redress we have only to suppose them parties to the transaction, intending to share an illicit gain among themselves. It is very obvious that if the two could not thus act, the five would equally be precluded. If the five had represented themselves as having purchased land for the company, at the price for which they were offering to sell it again, they could not by these means have deprived the corporation of redress when subsequently organized. And what they could not do if they were parties to the transaction, neither could they by conniv-

ing at it on the part of others; for where a man could not keep a profit himself, he can not consent that another shall make and keep it by wrong or untruthfulness.”]

In answer to the defendant's points, the court charged:

“There is an inconsistency, due it may be to a mere slip of the pen, in the language of the first point. It asks first that I should say, that unless the lands were purchased by the company itself, the action can not be maintained; and then asks me to say, that in making the purchase the defendants must not have been acting for themselves, but for the company. That is, I am asked to say, that in order to maintain the action, the land must have been purchased by the company for itself, and next by Messrs. Simons and Weeks for the company. What is meant, I suppose is, that unless this was a purchase for the company by Messrs. Simons and Weeks, there can be no recovery.

“If it were not for the form of the pleadings, I should be unable to answer this point in the affirmative, because if any man, the merest stranger, deceives or leads the party with whom he is dealing into error on a material point, the law will give redress. There is evidence on this head which I should have to submit to you; but under the pleadings I affirm the point, as it has indeed been the ground of my instructions to you throughout the charge, unless this purchase was made by Messrs. Simons and Weeks for the company and not for themselves, there can be no recovery here. But, in saying this, I reiterate that if they held themselves out to the world by advertisements, and by oral declarations intended to be and actually published, as having bought these lands for the company, their secret purposes in the transaction will not avail to prevent them from being bound by their public declarations.

“I also affirm the second point.

“Unless the parties were acting together, either as partners or participators, this action can not be maintained. It is, however, in evidence, that they shared the profits, and that affords a fair ground for inference—necessarily conclusive, it is not—that they were both concerned in the transaction; and besides Mr. Weeks originally negotiated for the land which was subsequently conveyed through Mr. Simons to the plaintiffs.

"The third point contains an affirmative and negative allegation, and states explicitly what I have already told you; that if it was not for the form of the pleadings, you would have to decide whether there was not actual fraud, even if the lands were purchased for the company. I do, however, affirm the negative part of the proposition; and in connection with it, the other. That is to say: Unless the land was purchased for the company, there can not be a recovery here; you will, however, remember the caution which I have already given that what people mean is to be judged by what they avow, and not by any secret design which they do not declare.

"I decline to instruct you as requested in the fourth point, that the verdict must, under the evidence, be for the defendants."

The defendants excepted to the charge and answers of the court. The court then said:—

"The defendants' counsel think that I have taken two matters from you as questions of law, which I meant to leave to you as questions of fact.

"One question is, whether Mr. Cox, one of the corporators, authorized the advertisements. I certainly did not intend to take from you the fact, whether it was authorized by the five or by four. The more material question is, whether they were authorized by the defendants; but by whom authorized, I leave to you as a question on the evidence.

"The other point is perhaps more important. It is said, that in speaking of the alleged knowledge of the other corporators, I have taken the question of their knowledge from you, instead of leaving it to you on the evidence. Such was not my intention. (Whether they knew the real state of the case, or not, is a question for you to decide on the evidence. The effect of their knowledge in precluding the plaintiffs, depends upon another question of fact. That is to say, whether the land was bought for the company under circumstances making it incumbent on the defendants to convey for the price which they gave, for if it was so bought the other corporators could not, by sanctioning an overcharge, make it binding on the plaintiffs.)"

The verdict was for the plaintiffs for \$80,648.98.

A rule which was taken for a new trial was discharged, THAYER, J., dissenting, and judgment entered on the verdict May 2d, 1868.

To this judgment the defendants took a writ of error.

They assigned amongst other errors:

2 and 3. The admission of the advertisements of November 27th, and December 17th, 1864, containing the prospectus of the Vulcan Oil Company.

4 and 5. Admitting the testimony of Brosius as to representations made to him by Weeks as being out of the presence and knowledge of Simons.

6 and 7. Refusing to strike out the testimony of Brosius and receiving that of Amon; both witnesses being as was alleged incompetent on account of interest.

8. Admitting the testimony of Amon as to representations made to him by Weeks, out of the presence and knowledge of Simons.

9. Rejecting the testimony of Potts and others to explain the meaning of "original owners."

10-13. The answers of the court to the defendants' points.

14-22. The portions of the charge enclosed in brackets.

A. M. BURTON and T. CUYLER, for plaintiffs in error.

E. S. MILLER, for defendants in error.

The opinion of the court was delivered, May 11, 1869, by

THOMPSON, C. J.

A great point of contest on the trial below was as to the capacity in which the defendants acted in acquiring the territory on which operations in mining for oil were to be inaugurated and carried on by a company intended to be formed; and whether they professed to their associates and the public that they had purchased it for the company and were conveying it to the company at original cost, content, like other shareholders, to take their chance of profits out of the stock to be issued. There was much testimony on the point tending to prove these to have been their representations. Besides the deeds from their vendors, which exhibited on their face, as considerations paid, sums greatly in excess of those actually paid, prospectuses were issued by them in connection

with their associates for circulation and publication in newspapers, representing that the lands acquired were obtained at first cost from the vendors. All the testimony on this point received by the court was submitted to the jury with full and explicit instructions by the learned judge trying the case. In these instructions, was contained the principle accurately announced, that if the defendants in fact acted as agents of the company in acquiring the property, they could not charge a profit as against their principal. Nor was their position any better if they assumed so to act without precedent authority, if their doings were accepted as the acts of agents by the association or company. If in order to get up a company they represented themselves as having acted for the association to be formed, and proposed to sell at the same prices they paid, and their purchases were taken on these representations, and stockholders invested in a reliance upon them, it would be a fraud on the company, and all others interested, to allow them to retain the large profits paid them by the company in ignorance of the true sums actually advanced.

On the facts as submitted, the jury found against the defendants, and we are now to see whether there was any error in the law as laid down by the court.

In Lindley on Part. 497, the principles arising on facts like those referred to, are very succinctly stated. The language of the learned author, after stating the rule that neither partners nor directors of a company are at liberty to make individual profits out of the business of the concern without the knowledge and assent of associates, says: "The rule under consideration is peculiarly applicable to transactions *which precede the formation* of a company or partnership. Judging from recent events and disclosures, nothing seems more common than for a person in getting up a company to obtain for the company, property of which it is in want, and try and make the company pay him more than he gave for it. Such a transaction can never stand. There may undoubtedly be a valid sale to a company by persons engaged in getting it up; but once let it be shown that the alleged vendor obtained the property when it was his duty to obtain it for the company, and it immediately follows that he can not, without the fullest disclosure on his part charge the company with more than he actually gave."

To the same effect also is the opinion of Sir J. ROMILLY, M. R. in *The Bank of London v. Tyrell*, 5 Jurist, N. S. 924. See also the same principle in the *Great Luxembourg R. R. Co. v. Magney*, 25 Beav. 586.

The principle is undoubtedly the same where parties profess to have acted for a company and their purchases have been accepted on representations that they were made for it. In one or the other of these attitudes, namely, as agents of a company to be gotten up, or as having professed so to have acted, the jury must have found they stood. In either, it seems clear, they could not legally retain the advance price on the property which they received.

To ascertain whether the result arrived at through the finding of the jury is to stand, we will consider first the exceptions to the ruling of the court on points of evidence:

1. The exception to the exclusion of a portion of W. L. Humphreys' deposition, was not much insisted on in argument, nor could it well have been, and we dismiss it without further notice.

2. The 2d and 3d exceptions relate to reception in evidence of the prospectuses of the Vulcan Oil Company, published on the 27th November, and the 17th December, 1864. We think they were admissible, without doubt, in the circumstances of the case. Notwithstanding the action was in form *ex contractu*, yet it could only be successfully maintained by showing imposition and fraud on the part of the defendants in dealing, as it was alleged they did, with the company, by reason whereof *ex æquo et bono* they ought not to be allowed to retain the moneys wrongfully obtained from it. To establish fraud was the turning point in the plaintiff's case. That was to be done by proving facts and circumstances, the results of the acts and declarations of the defendants upon the company. In all such investigations great latitude of inquiry is always allowable.

There was testimony proper to go to the jury, tending to show Weeks's connection with the advertisement of the 27th November. Such, for instance, as the receipt of the publisher, for his charge for advertising, handed with other papers of the company, by him to the secretary after its organization; the reference to Weeks's place of business in it, as the office

of the company, and to negotiations then on foot, which were subsequently shown to be those conducted by the defendants through their agent Humphreys, who was at that time in the West looking for oil territory for them. There were many other circumstances preceding or subsequently given in evidence, to warrant the reception of this evidence. It was a step towards the fact to be established, namely, that the defendants were holding out to the public, that real estate was being secured by them for a company to be organized, and that it was to be put into the concern at what it cost and no more. It was material evidence against both defendants, provided the transaction of the purchase and sale was the combined act of both, which the testimony certainly, we think, sufficiently showed it was. It was properly received.

So also was the prospectus of the company of the 17th December. That was signed by Simons, as president *pro tem.*, and Willoughby, as secretary *pro tem.* It was the declared act of one of the defendants, and was clearly evidence under the bill of particulars, which proposed to show the joint action of the defendants in accomplishing the sale to the company for \$81,000 and upwards, and their joint receipt of the purchase money from it. As the act of Simons it was clearly evidence against him, and might or might not be against Weeks, the other defendant, on the testimony given and to be given.

It was a fact in the transaction, and not to be excluded because of a possibility that the jury might mistakenly suppose the company to be organized before it was in fact. If that apprehension was the ground of objection, the jury would doubtless have been apprised that they must not fall into that error. We think the evidence was properly received, and this error is not sustained.

3. We perceive nothing in the argument of the 4th, 5th, 6th, 7th and 8th assignments of error, which creates a doubt of the accuracy of the learned judge below in the rulings which are the subject of them. We will consider them together.

The declarations of Weeks, a party to the suit, relating to the subject-matter of it, were evidence against himself, no matter when made. Whether they should affect Simons, would depend on whether their acts amounted to a joint enterprise, to induce the company about to be organized, to agree

to purchase, and after organization to perfect the purchase of the lands secured by them in West Virginia, at the sums they represented that they had paid for them. Under such a state of facts the declarations of one would be evidence against both. If they assumed to be or were partners in fact in the transaction, there could be no doubt that the declarations would be evidence against both. There was evidence of a partnership, or joint purchase by the defendants of these lands as well as of a sale for the joint interest of both. On both grounds the testimony was properly received.

Nor was there any error in the refusal of the court to strike out the testimony of Brosius on the ground of interest, even if such refusal was assignable for error, which we have said is not the case where the testimony of witnesses is given without objection: 11 Casey, 792. The correction in such cases is a request to charge that the evidence be disregarded. His supposed liability for non-performance of his official duties was neither fixed nor threatened, so far as the objection discloses. He was certainly not directly involved in the result of the verdict; nor could it be evidence for or against him in any subsequent suit. His supposed liability was a presumed peril, contingent and remote, and did not disqualify him. Indeed, it would have required a trial to determine the validity of the grounds of objection, and the court could not arrest its proceedings to indulge the parties in this. There was no error in this ruling.

The fact that the witness, Jacob Amon, was a stockholder in a company to which the plaintiff was indebted, was not a ground of incompetency to testify. A creditor may be a witness for his debtor: *Fell v. McHenry*, 6 Wright, 41; *Gillespie v. Miller*, 1 Id. 250. We have already noticed an objection to the testimony given of the declarations of the defendants. No matter where they were made, if they were relevant they were receivable. Their effect would be another matter with which the jury had all to do.

4. The 9th specification of error is overruled. The words "original owners," in the prospectus were not terms of art, science or trade, which required the aid of experts to explain. Nobody could well mistake their meaning. They simply imported that no profits were added to the prices paid by the

company for their lands, on account of any intermediate party, buyer or agent between it and the precedent owners of the soil. It excluded the idea of a purchase at speculative prices. This was the import of the terms, and to convey that idea in plain language was the object in using them. The court committed no error in refusing to hear an exposition of words which would in all probability have disturbed their meaning or have attributed an entirely artificial one, supposed but not settled, to spring out of dealings incident to oil property. Their ordinary meaning was well understood, and in this sense they were most fitly used; at least there was nothing to show that they were not so used. It was, therefore, not a case for experts or skilled witnesses to interpret.

5. The exceptions to the charge are thirteen in number. The answers to the 1st, 2d and 3d of these were substantial, and I might say literal affirmations of the points of the defendants of which they are predicated. The court laid down the law favorably to them by the instruction to the jury that unless the land was purchased for the company by the defendants, there could be no recovery against them for the advanced price paid them. In this the court but affirmed the familiar doctrine that an agent can not make profits out of his principal, in the business of the agency, nor a partner out of his co-partner without his assent; nor an associate out of co-associates for whom he has undertaken to act. That this is the law, authorities need not be referred to, to prove. It is elementary. It was also assented to, that both defendants must be shown to have engaged in the transactions of the purchase and sale afterward to the company, and in a joint participation in the receipt of the purchase money before there could be a recovery against them. This was what the defendants contended for, and the answers of the court need no vindication at our hands.

The 4th and last point the learned judge refused. It assumed the fact that the land was put in at \$81,000 in the formation of the company by the assent of the five original co-partners; that they represented the company, and bound it by their acts and assent, and that therefore the verdict should be for the defendants.

This, in effect, asserts the position that the organizing board

of directors was the company, and whatever it did, could not be inquired into by the corporation, put in motion at the instance of the stockholders. This is an error, and results from overlooking the fact that directors are but the agents and trustees of the company; that they have power only to act for the interest of the company and not against it. The shareholders constitute the company where there is stock, and not the directors. It was therefore well put, in the charge of the learned judge, that the directors had no power to bind the stockholders by allowing profits to the defendants, after holding out in their prospectus that the property was obtained at original prices; and that the defendants could not claim any, if they hold out that they had purchased the property for the company and were conveying at original prices. A fraud perpetrated against the corporation by any or all of the directors, may assuredly be redressed by such an action in the name of the corporation. As already said, they are its agents and trustees, which implies accountability to their principal. It was, therefore, not error to hold, as was held in the court below, that the act of the directors, even if they knew the price paid for the land was less than the sum at which it was sold by the defendants, to the company, did not preclude inquiry, and a recovery back of the excess, if that excess was not legally receivable by the defendants. In law this position was undoubtedly and properly asserted, and at the same time the jury were left free to consider whether the facts presented such a case. We do not doubt that if the defendants had disclosed the exact sum at which they bought the lands, and had refused to sell for less than the sum which they eventually received, their right to hold the sums received would have been unimpeachable; but the facts in evidence were such as satisfied the jury that there was concealment and misrepresentation as to the terms of purchase by the defendants professing to have acted for the company. The deeds from the original vendors proved this. But it is not our purpose to discuss the facts, and we will not enlarge further than to say we think the court committed no error in refusing to affirm the defendants' 4th point, and charging as they did, in the general charge, in this phase of the case.

6. We have very carefully examined the charge of the

learned judge, and the exceptions to it, and we think there is nothing in any of them which needs discussion to vindicate the accuracy of the court. The case was presented to the jury fairly and clearly, on unexceptionable principles, all of which were afterward reviewed and approved by the court in banc. And as on a careful review here, we have not discovered error in any of the specifications brought to our notice, the consequence is, that the judgment below must be affirmed.

The point whether there could be a recovery against both defendants in this form of action, without showing the actual receipt of money by both, although not distinctly raised by any point in the case, has been somewhat discussed on argument. Undoubtedly this was a fact necessary to be proved but, like any other fact, it was susceptible of being established by proof of acts and declarations of the parties sought to be charged. The receipt by an agent of a party would be *prima facie* evidence of the receipt by the principal, and as partners are agents for the firm and for each other, when the transaction is single, what possible inference could there be from the receipt of one, but that it was for the use and benefit of both? Repeated declarations accompanied by the strongest corroborative acts, showed these defendants to be partners, and jointly interested in the proceeds of the transaction with the plaintiff's company. The receipt, therefore, by Weeks of the money from the company, was susceptible of sustaining the inference that it was for the benefit of his copartner as well as himself, and threw upon the latter the burden of establishing a different state of facts. This he did not do. In fact, as corroborative of the plaintiff's case, the sum of \$12,000, part of the profits of the transaction, was actually received by Simons himself. Under this state of the proof, if believed, the receipt of either would be the receipt of both, and upon this ground a recovery against both would be right.

There was, undoubtedly, great laxity of morals, in dealing about real estate in oil sections, during the excitement consequent on its discovery. Many transactions, like that under consideration have taken place, without being subject to judicial investigation, and parties have pocketed rich returns; while others have suffered disastrous diminution of their means; but the impunity with which many have speculated

by unjustifiable means, and escaped a call to account to those wronged, does not impair the efficiency of the law to redress such a wrong whenever it is judicially made to appear. Hundreds have done, as was done in the case before us; it had become a common thing, and men of fair standing did not hesitate to represent property as having cost sums much beyond those paid by them, as inducements to enlist purchasers. This was wrong in law as well as morals, where there was a relation of trust and confidence, in fact or assumed, and in such cases it is the morality of the law to hold the party so representing to the position he may have occupied, or assumed to have occupied.

Seeing no errors in the record, we have nothing to do but to affirm the judgment of the court below.

Judgment affirmed.

¹BYARD V. HOLMES.

(34 New Jersey Law, 296. Supreme Court, 1870.)

²Essential requisites in action for deceit. To maintain an action on the case for deceit, the plaintiff must allege and prove—1: That the defendant made representation to plaintiff meaning that plaintiff should act upon it. 2: That such representation was false to the knowledge of defendant when he made it, and 3: That the plaintiff believing such representation to be true, acted upon it and was thereby injured.

Relation between the fraud and the damage must appear. The declaration must show, not only what the fraud was by which the plaintiff has been injured, but also its connection with the alleged damage, so that it may appear judicially to the court, that the fraud and the damage, sustain to each other the relation of cause and effect, or at least that the one might have resulted directly from the other.

³Form of pleading false pretenses. A mere general averment that the matter was a pretense, and that plaintiff was deceived by it is not sufficient either in criminal or civil cases; it can be done in no other way than by a distinct and specific averment of the falsehood of each separate matter of fact stated by the defendant, and intended to be denied by the plaintiff.

On demurrer to declaration.

¹ Same case on former trial, 6 M. R. 598.

² *Larimer Co. v. Cowan*, 5 Colo. 320.

³ *Thomas v. Mackey*, 3 Colo. 390.

Argued before the CHIEF JUSTICE, and BEDLE, SOUDDER and WOODHULL, Justices.

For the demurrer, T. RUNYON.

Contra, A. B. WOODRUFF.

WOODHULL, J.

This is an action on the case for deceit. The declaration to which there is a general demurrer, contains four counts, the first three alleging deceit, etc., on the sale of certain oil stock, and the fourth on the sale of certain oil lands.

The action being grounded on fraud in the defendant, concurring with damage to the plaintiff resulting from that fraud, to maintain it, the plaintiff must allege with reasonable certainty, and be prepared to prove at least these three things. 1. That the defendant made some representation to the plaintiff, meaning that he should act upon it. 2. That such representation was false, and that the defendant when he made it, knew it to be false. 3. That the plaintiff believing such representation to be true, acted upon it, and was thereby injured. *Lummis v. Stratton*, 2 N. J. L. 245; *Pasley v. Freeman*, 3 Term R. 51; *Opton v. Vail*, 6 Johns. R. 181; *Langridge v. Levy*, 2 Mees. & W. 519; *Gerhard v. Bates*, 2 E. & B. 488 (75 E. C. L.).

As the plaintiff can recover nothing in this action without proof of material fraud—that is, such as has resulted in actual damage—and can recover for such loss only as he can show to be a direct consequence of that fraud, (Sedgwick on Meas. of Dam., 659; 2 Parsons on Contracts 769; *Ib.* 771) it follows that the plaintiff must show with reasonable certainty in his declaration, not only what the fraud was by which he has been injured, but also its connection with the alleged damage, so that it may appear judicially to the court that the fraud and the damage sustain to each other the relation of cause and effect, or, at least, that the one might have resulted directly from the other.

The degree of certainty required in a declaration is that which is usually designated as certainty, to a certain intent in general, and is the same as that required in indictments and

informations. 1 Chitty's Pl., 268; Gould's Pl., 73-75, §§ 53-55, (ed. 1861.)

Tested by these principles the first count will be found to be bad for uncertainty.

It fails to disclose with that degree of certainty which the rules of pleading require in a declaration, any false representation made by the defendant to the plaintiff by which the plaintiff could have been deceived and injured.

The representation alleged is that the defendant on a certain day, was "the owner of seventy acres of good oil land, on oil creek, near McClintockville, in the State of Pennsylvania, which said seventy acres of land, he, the said defendant, was to put into the said company, to be owned and used by said company in boring for and procuring oil therefrom, and that there were seven oil wells upon the said land;" and the only averment by which the plaintiff attempts to negative or falsify this representation is in these words: "Whereas, in truth and in fact at the time, etc., the said defendant was not the owner of seventy acres of good oil land on oil creek, near McClintockville, in the State of Pennsylvania, nor of any such like quantity of oil land there, which he, the said defendant, was to put into the said company, to be owned and used by the said company in boring for and procuring oil therefrom as aforesaid, which he, the said defendant, well knew."

Now, what is the effect of this general denial of the alleged pretence, or pretences of the defendant?

It is to be understood as terminating upon the time, and does it mean nothing more than that the defendant on the very day stated, did not own, etc.? Assuming this to be its meaning—and it certainly may mean this, and nothing more—the misrepresentation is manifestly immaterial, for the defendant may have owned the land described on the next day, and may have put it into the company as the basis of its stock; and if he did, it could make no possible difference in the value of the plaintiff's stock, whether the defendant owned the land on the day stated, or not.

But the real difficulty is that this attempt to negative, by a mere general denial, a complex statement embracing several distinct particulars, necessarily leaves it in doubt whether the plaintiff intended to allege that all the particulars are false, or only some, or one of them.

The negation may be understood to terminate on the time; but it may just as well be understood to terminate on the quantity of the land, or on its location, or in its quality, or on any other particular fact embraced in this representation. If all of these connected particulars are untrue, the negation will, of course, be satisfied; but it will be equally so if only one of them is untrue, and that one the least important of them all, and, perhaps, wholly immaterial.

The inevitable result is, that neither the court nor the defendant can possibly know either what the false representation, by which the plaintiff was deceived and injured, really was, or what the plaintiff himself, conceived it to be.

On well established principles of pleading, already referred to, such uncertainty as this must be equally fatal, whether found in an indictment or in a declaration.

The result of the authorities, so far as I have examined them, whether cases or precedents, is, that a mere general allegation that the matter stated was a pretense, and that the plaintiff was falsely and fraudulently deceived by it, is not sufficient, either in criminal or civil cases, to fasten upon such matter the character of a false pretense, and that this can be done in no other way than by a distinct and a specific averment of the falsehood of each separate matter of fact stated by the defendant, and intended to be denied by the plaintiff: *King v. Perrott*, 2 M. & S. 379; *People v. Stone*, 9 Wend. 182; *People v. Haynes*, 11 Wend. 557; *People v. Gates*, 13 Wend. 311; 3 Chitty's Crim. Law, 999-1021; Archbold's Crim. Pl. 245-247; Wharton's Am. Crim. Law, 643; 2 Chitty's Pl. 680-711.

What has been said with reference to the first count will be found to apply, in all respects, to the second and third, and, I think, substantially to the fourth count also.

Although at first inclined to the opinion that the fourth count might be sustained, a closer examination of it has satisfied me that it is open to the same objection as the others, although, perhaps, not quite to the same extent.

The only difference in the statement of the pretenses is the addition here of the words "and that the said land was of great value as oil producing land, and that great gains and profits would be made by investing money in the said land."

And the only difference in the denial of the alleged pretenses is the introduction of the words "or elsewhere" after "Pennsylvania" and immediately after the *scienter*, the addition of the words "but on the contrary, the said defendant had only three and a half acres of oil land on Oil creek, in said State, which were of no use or value as oil land, and no gains or profits could be, or were made by investing money in the said land, but the same were of no use or value as oil producing lands."

The bargain alleged in this count is for a "right and interest in certain oil lands" which were to be made the basis of an oil company. How does it appear that these lands were not made the basis of an oil company? Whether the defendant owned seventy acres of land, or only three and a half acres, or none at all, on the very day stated, is of no consequence, provided that land, such as he described, was afterwards put into the company by him or by his procurement.

That part of the denial in which the plaintiff attempts to be more specific than in the other counts is altogether too vague to be of any value in the case. "But, on the contrary, the said defendant *had* only three and a half acres." *Had* when? *Had* in what sense? The pretense alleged is "that the defendant *owned* seventy acres," etc., the plaintiff attempts to deny this by averring that the defendant *had* only three and a half acres, etc.

On the whole it must be conceded, I think, that the fourth count is very little, if any better, on the score of certainty, than the others.

We have here, in effect, the same complex statement, embracing several different pretenses, the same attempt to negate these pretenses in a lump; and as the result the same perplexing doubt, whether after all the defendant may not have done in good faith, all that he undertook to do, or if not, whether he has failed in such a way as to work any damage to the plaintiff.

There must be judgment for the defendant.

CHIEF JUSTICE, and BIDDLE and SCUDDER, Justices, concurred.

COOPER V. LOVERING.

(106 Massachusetts, 77. Supreme Judicial Court, 1870.)

¹ **Purchase on letters without personal knowledge by either party.** In an action on a note given for the purchase money of oil lands defendant averred fraud. It appeared that plaintiff himself had never seen the lands in question. That the only knowledge he had of them was by letters from his brother. That he showed these letters to defendant, and told him he had no knowledge of the land, but that his brother was a "trustworthy and reliable person" (which was not negatived). Defendant bought the land, telling plaintiff it was because of his confidence in him. *Held*, that if the letters were shown in good faith without concealment, and the plaintiff believed the writer entitled to confidence, and explained his want of personal knowledge, the facts were no defense to the note.

Contract on a promissory note given by the defendant to the plaintiff. Answer, that the note was given for the purchase of oil property, so called in Pennsylvania, concerning which the plaintiff had made fraudulent representations.

At the trial in the superior court before REED, J., the evidence tended to show "that the plaintiff, who had never himself been in the oil regions, employed his brother who was going from Boston to St. Louis, where he resided, to stop on his way among the oil lands of Pennsylvania, and if he found anything valuable to inform him thereof; that the plaintiff received letters from his brother, informing him of the property in question; that these letters were read by the plaintiff to the defendant and contained statements that the land was very valuable for farming purposes; that there were indications of oil upon it; that there was great excitement in the neighborhood, caused by the oil discoveries; that the land in question might be sold for a higher price than he had agreed to give; and that he had the refusal of it, or a bond for a deed of it, at the price of \$18,000 for fifty acres; that shortly afterward another letter was received by the plaintiff from his brother, informing him of another piece of land, for the same price, a part of the same farm consisting of fifty acres, the indications of oil on which, were quite equal, if not superior to those upon the former piece; that this letter or extracts thereof

¹ *Clapham v. Shillito*, 6 M. R. 431.

were also read by the plaintiff to the defendant; that the defendant told the plaintiff that if he bought, it would be because of his confidence in him; that the plaintiff told the defendant, in substance, that his brother was trustworthy and reliable; and that, because of these and other like statements, the defendant was induced to and did buy."

The testimony of the plaintiff tended to show that "he had never at the time of the interview between himself and the defendant and at the time of the contract, been upon or into the neighborhood of the land in question; that the defendant knew this; and that he believed and relied upon the representations contained in the letters."

The judge, among other instructions, instructed the jury "that a fraudulent misrepresentation which would enable the defendant to avoid his contract, must be a misrepresentation of matters of fact, and made by the plaintiff as of his own knowledge; that no expression of opinion or judgment made in good faith, and no statements made in good faith, and known to be founded on the representations of others, would constitute such misrepresentation; that no statements as to the value or cost of the property, or of offers made therefor by others, if untrue, were in law fraudulent or sufficient to sustain this defense; that if the plaintiff made false representations as to the contents of the letters from his brother, or in bad faith withheld any information therein contained upon any material particulars, the allegations of fraud were sustained; but that if he truly read or stated the contents thereof, relying upon them and believing them to be true, having no personal knowledge himself of the property, and so representing to the defendant, such acts would not be fraudulent." The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

I. STORY, for the defendant.

J. S. ABBOTT, for the plaintiff.

AMES, J.

In order to make out the charge of deceit, whether in support of an action, or as a ground of defense, it is generally nec-

essary to show a misrepresentation by the party charged of a material fact, not within the observation of the other party, the person making the representation either knowing it not to be true, or having no knowledge on the subject, and making it with utter disregard to its truth or falsity: *Small v. Atwood*, Younge, 407, 461; *Brown v. Castles*, 11 Cush. 348; *Stone v. Denny*, 4 Met. 151. It has been repeatedly decided that representations of a vendor as to the value or cost of the property to be sold, or as to offers for it made by others, even though false, are not representations upon which a purchaser ought to rely, and are not sufficient to furnish any ground of action or defense: *Hemmer v. Cooper*, 8 Allen, 334; *Manning v. Albee*, 11 Allen, 520; *Mooney v. Miller*, 102 Mass. 217. It does not appear from the bill of exception in the case at bar, that the plaintiff had any knowledge or information as to the the oil lands which it was proposed to buy, except what he derived from letters received; from his brother; or that he made any representations of any kind to the defendant except as to the contents of these letters, and as to the good faith with which they were written. If he intentionally misstated their contents, that would amount to a misrepresentation of a material fact and would come within the established definition of deceit. If he knew that the information contained in the letters was false and that the writer was not "trustworthy and reliable," it would of course be fraudulent if by words or acts he induced the defendant to act and rely upon them, and to incur damage and loss by such reliance. But if he himself believed the information contained in the letters to be true, and the writer to be entitled to confidence, and if he truly and honestly stated the contents of the letters, and explained to the defendant that he had no other personal knowledge on the subject-matter, such representations on the plaintiff's part would not be fraudulent. Such, we understand, to have been in substance the instructions of the court, which appear to have been all that the circumstances of the case, and the nature of the alleged misrepresentation required. We do not think that the jury were misled.

Exceptions overruled.

¹ McCABE V. BURNS ET AL.

(66 Pennsylvania State, 356. Supreme Court, 1870.)

² **Reconveyance—When not necessary.** B. & S. projected an oil company and induced M. to subscribe to the stock. The land on which it was based was afterward conveyed to the company by the vendor of B. & S. M. sued them to recover the money paid for his subscription, on the ground of their fraudulent misrepresentations. It was not necessary that M. should first tender a reconveyance of the land. The company not being incorporated, no estate passed by the conveyance, and M. had no interest, legal or equitable, in the land.

Receipt need not be returned. B. & S. had given M. a receipt for his subscription, but no stock had been issued to him; he was not bound to tender the stock nor the receipt which was the evidence of his payment.

³ **Acts of conspirators.** There was evidence that B. & S. acted in concert and made false statements in procuring the subscriptions of M. and others. Evidence of the acts and declarations of B. & S. or either of them, either in the presence or absence of M., if tending to throw light on the transaction or corroborate testimony already in, was admissible.

November 1, 1870. Before THOMPSON, C. J., READ, AGNEW SHARSWOOD and WILLIAMS, JJ.

Error to the District Court of Allegheny County; of October and November Term, 1869, No. 135.

This was an action of assumpsit brought, July 13, 1867, by William P. McCabe against John Burns and Samuel Stevenson, to recover \$250 paid by the plaintiff as part of the subscription price of a share of stock in an oil company, paid under fraudulent misrepresentations.

The case was tried July 7, 1869, before KIRKPATRICK, J.

The plaintiff gave in evidence this receipt:

“Middletown, January 26, 1866.

“Received of William P. McCabe \$250, the first installment on one share of stock in the Middletown Oil Company. The company lands are located on the Little Beaver Creek,

¹ Same case, on second writ of error, 7 M. R. 1.

² *Babcock v. Case*, 6 M. R. 618.

³ *Simons v. Vulcan Co.*, 6 M. R. 633.

St. Clair township, Columbiana county, State of Ohio, consisting of 8 acres and 20 perches in fee simple.

"JOHN BURNS. SAMUEL STEVENSON."

He then gave in evidence a deed dated March 1, 1866, from Daniel Smith to the Middletown Oil Company for certain premises containing 8 acres, 20 perches, in Columbiana county, Ohio, the consideration stated in the deed, being \$26,000.

The plaintiff testified that Burns asked him to enter into "something" which he and Stevenson had for "his friends and neighbors," which would treble their money as soon as they got possession; that plaintiff should stand on the "ground floor," as he and Stevenson did; they were not making a cent. He described to plaintiff where the land which was the subject of the project was. He said they were to pay \$26,000 for it. Plaintiff would not agree to go in unless he could get his money out before spring. Burns said he would guaranty his money to him in thirty or sixty days. At the date of the receipt, at a meeting for the purpose of getting subscribers to the stock, Burns told Stevenson to take plaintiff's money, he paid \$250 to Stevenson, who gave him a receipt. The plaintiff took one share of stock at \$500 and gave his note for \$250; Burns took the note. At this meeting Burns and Stevenson, both being present, the same representations were made as to the price they were to pay for the land. There was evidence that Burns and Stevenson had paid a much smaller sum for the land; that the property was not located where it had been represented that it was; that the Middletown Oil Company was not in existence, and of other facts tending to sustain the plaintiff's case.

During the trial the plaintiff made the following offers of evidence:—

A. To prove "that the money subscribed and paid on the same night and terms as that by the plaintiff, was afterward refunded by the defendants to several of the subscribers, to wit: Robert Gracey, William Lee *et al.*, on the ground that defendants had not properly or correctly represented the location of the land, or given the parties the correct amount of purchase money thereof."

B. To prove "that one of the defendants, John Burns

promised to pay him, the witness on the stand, the money back that he subscribed and paid on January 27, 1866, on the same terms as the plaintiff; and the reason that the defendant made said promise was because he had misrepresented the value and location of the property, and that if he, the witness, would keep quiet and not tell or alarm the other subscribers, he would give him his money back."

C. To prove "that at the time John Burns, one of the defendants, was trying to induce persons to subscribe to the stock of the company mentioned, he represented to witness on the stand and others, that the property was located on Little Beaver creek, near the Sugar Tree Derrick, just below the mouth of Island Run, and that they, defendants, had agreed to pay Daniel Smith for the property the sum of \$26,000 or \$3200 an acre. That he was only an agent for the company in buying the property, and made nothing by it. This, with the evidence already in, and to be followed by other evidence, to show that in point of fact defendant had agreed to pay a less sum for the property, and that it was not located at the place represented."

D. "To file of record, for the use of defendants upon the payment of any sum, for which a verdict may be recovered against them in this case, a quit claim deed from the plaintiff, William P. McCabe, to the defendants; John Burns and Samuel Stevenson, dated June 8, 1869, duly executed, acknowledged and stamped. This filed of record, not because the plaintiff has any legal or equitable title to the land therein described, but so that defendants, in case of a recovery against them, may take any supposed title the plaintiff may have therein, on payment of such recovery. This deed is asked to be filed, subject to delivery as the court may direct."

E. "To prove, that about August 1866, after the parties who held stock or interests in the property mentioned, and known as The Middletown Oil Lands, discovered that the representations made by defendants at the time they advanced the money, were untrue, they abandoned the premises, and the defendants removed the engine and machinery from the premises, and sold them to James Rees to pay a debt they had contracted with him."

All these offers were objected to by the defendants, rejected by the court, and several bills of exception sealed.

The plaintiff having closed his case, the defendants moved for a non-suit, on the ground that he could not maintain the suit without having tendered a reconveyance of the land conveyed by Smith. The non-suit was ordered. The court afterward discharged a rule to take it off.

The plaintiff took a writ of error and assigned for error the rejection of his offers of evidence, and entering the judgment of non-suit.

J. BARTON and R. WOODS (with whom were WHITE & SLA-
GLE), for plaintiff in error, referred to *Pearsoll v. Chapin*, 8
Wright, 9; *Simons v. Vulcan Oil Co.*, 11 P. F. Smith 202;
Markley v. Swartzlander, 8 W. & S. 172; *Hall v. Holmes*,
4 Barr, 251.

J. H. BAILEY and T. M. MARSHALL, for defendants in error,
referred to *Pearsoll v. Chapin*, *supra*; *McElenny's Ap-
peal*, 11 P. F. Smith, 188.

The opinion of the court was delivered, January 3, 1871,
by WILLIAMS, J.

This case does not come within the rule laid down in *Pear-
soll v. Chapin*, 8 Wright, 9, which decides that where a sale
of land has been induced by the false and fraudulent repre-
sentations of the vendor, the vendee must first tender a re-
conveyance before he can recover back the price paid. Here
the plaintiff's subscription, on which the money sought to be
recovered was paid, was not for land, but for stock in a com-
pany to be organized, of which the defendants were the pro-
moters. The land purchased by the defendants was not con-
veyed to the plaintiff, and the other subscribers for stock, but
to the Middletown Oil Co.; and if, as the evidence shows, the
company was never incorporated, no estate passed by the con-
veyance, and the legal title still remains in the grantor. It
is clear, then, that the plaintiff, under his contract of sub-
scription, had no such legal or equitable interest in the land
as made it his duty to tender a reconveyance or release before
he can recover back the money which he paid on account of

his subscription, if it was procured, as alleged, by the false and fraudulent representations of the defendants. Nor was the plaintiff bound to make a tender of the stock for which he subscribed before he can recover back the money which he paid on his subscription, even if the rule laid down in *Pearsoll v. Chapin*, is applicable to the sale of personal property, for no stock was ever issued to him. All that he received from the defendants was their receipt for the money which he paid, and he was not bound to surrender the evidence of its payment before he could recover the money back, if it had been fraudulently obtained. The court therefore, erred in applying the rule to the contract of subscription in this case, and as there was abundant evidence to go to the jury, tending to show that the subscription was procured by the false and fraudulent representations of the defendants, the question should have been submitted to them with proper instructions.

The evidence proposed to be given by the plaintiffs, under their second and third offers, marked "B" and "C," should have been received. At the time these offers were made and rejected by the court, the plaintiff had given evidence tending to show that the defendants acted in concert in procuring, from the plaintiff and others, subscriptions for stock in the company they proposed to organize, and that both had made false representations in regard to the location of the land, and the price for which it could be obtained, and the consideration actually paid for it. Under this state of the evidence, it was competent for the plaintiff to show the acts and declarations of either of the defendants, whether done or made in the presence or absence of the plaintiff, or of each other, if they tended to corroborate the testimony already received, or to shed any light on the character of the transaction. We think that the evidence offered by the plaintiff was both relevant to the issue and corroborative of the testimony already given.

Our only doubt in regard to the fifth offer, marked "E," arises from the fact that it does not clearly appear, from the language of the offer, that the plaintiff was one of the parties referred to as having abandoned the property, after they discovered that the representations made by the defendants, at the time they advanced the money, were untrue. If the plaintiff was one of the parties intended by the offer, the evi-

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dence ought to have been received, for it tended to show a rescission of the contract on his part, and the defendants' acquiescence therein by taking possession of the personal property on the premises and disposing of it as their own. But if the plaintiff was not one of the parties referred to, the offer was properly overruled. It is so doubtful whether the offer, as made, included the plaintiff, that we can not say that the court erred in overruling it.

We see no error in the rejection of the other offers of evidence of which the plaintiff has any reason to complain.

But for the errors in overruling the offers of evidence particularly noticed, and in refusing to set aside the judgment of non-suit, the judgment must be reversed and the record remitted for a new trial.

Judgment reversed, and a procedendo awarded.

TATHAM ET AL. V. LEWIS ET AL.

(65 Pennsylvania State, 65. Supreme Court, 1870.)

Attorney of successive adventurers seeking purchase, favoring one of them—Facts of the case. One Taylor informed Tatham of the existence of zinc in a certain valley. Tatham, Taylor and Wilson as Tatham's attorney, visited the valley to obtain mining leases. Among others they bargained for one from Waite, which was signed by him, but which his wife refused to sign and it was therefore never delivered. Afterward, one Lewis, as a party proposing to buy out Taylor's interest in the adventure accompanied Taylor and the Attorney Wilson, to the mineral region. This attorney concealed the existence of the lease from Lewis nor did he inform Tatham of Lewis' intention to purchase. Lewis declined to buy out Taylor, but bought the Waite farm for himself, through Wilson as his attorney, in the benefit of which purchase Tatham now claimed to share. *Held*, that the lease referred to was void, having never been executed or delivered. 2. That as there was no confidential relation between Tatham, the plaintiff, and Lewis, at the time of the purchase by Lewis, the defendant, Lewis was not bound by the knowledge which Wilson possessed as the attorney for Tatham. 3. That as the remedy at law was complete against the attorney, for his fraud or negligence, there could be no recovery against him in equity.

Wife refusing signature to lease. A lease of the husband's lands, but made in the name of husband and wife, for the purpose of barring her dower, which the wife refuses to sign, is an instrument which has never become binding on either party although already signed by both the lessee and the husband, and upon the wife's refusal to sign: *Held*, that the husband had a right to destroy it.

¹**Purchase by one of several joint bidders.** Although parties may have negotiated jointly for a purchase, yet if there has existed no confidential relation between them the purchase by one of them for his own benefit can not be set aside.

Destruction of lease. The destruction of a lease once delivered, does not destroy the estate or term.

February 17th, 18th and 19th, 1870. Before READ, AGNEW, SHARSWOOD and WILLIAMS, JJ., THOMPSON, C. J., at *Nisi Prius*.

Appeal from *Nisi Prius*: In Equity: No. 30 to January Term, 1865.

The bill in this case was filed December 30th, 1864, by George N. Tatham, Henry B. Tatham and William P. Tatham, against George T. Lewis and Andrew P. Wilson and Andrew M. Jones and others, administrators, etc., of William J. Taylor, deceased.

The bill alleged that in 1859 Taylor, who was a professor of mineralogy, gave the plaintiffs information of a deposit of zinc on a farm in Blair county, Pennsylvania, called the Dickson or Waite farm, in consideration of which Taylor was to participate in any profit received by the plaintiffs. Early in 1860, the plaintiffs having retained Wilson, who was a lawyer residing in Huntingdon, as their counsel, visited Sinking Valley, in which the farm was situated, and as a result, determined to purchase mining leases in the valley. In the fall of the same year, Henry B. Tatham, Wilson and Taylor again visited the valley and obtained several mining leases in the names of Henry B. Tatham, (representing the plaintiffs) and Taylor. Under Wilson's instructions the wives of the lessors joined in the leases, and a number of blank leases signed by Taylor and Tatham were left with Wilson with instructions to him to secure as many as he could. In 1862, Taylor finding it inconvenient to bear the expense, requested H. B. Tatham to procure a purchaser for his interest, and negotia-

¹ *First Nat. Bank v. Bissell*, 2 McCrary, 73; *Post* PARTNER.

tions were entered into with one Manning in New York, which were not successful. In 1863, G. N. Tatham and Taylor, with Wilson as their counsel, again visited the valley to procure a lease from Waite as well as leases from other persons. Several leases were obtained, and after Wilson and Taylor had returned home, Tatham obtained a lease in duplicate from Waite, duly executed and acknowledged by him; Waite took the lease to procure his wife's signature, promising to send it to Wilson. It was not executed by the wife. The next day Tatham informed Wilson of these facts, and in June informed Taylor also, who repeated his wish to sell out his interest. At this point H. B. Tatham invited Lewis to purchase Taylor's interest, telling him of the locality of zinc, having previously informed him of the discovery. At Lewis's request, H. B. Tatham procured him an interview with Taylor, when it was arranged that Lewis, Taylor and Dr. Muckle, then in the employment of Lewis, should visit the valley, Wilson to accompany them. Lewis had been informed of the incomplete lease from Waite, and it was agreed that the entire operation should be for the joint account of Taylor, Lewis and the plaintiffs. Lewis knew that Wilson had been retained as Tatham's attorney. In July, 1863, Lewis, Taylor and Wilson visited the Valley. In August, Wilson procured an agreement from Waite to sell his farm for \$10,000, and afterward obtained a deed for it to Lewis, representing that he was acting for the plaintiffs, Taylor and Lewis. Wilson then instructed Waite to destroy the lease to Tatham; that it had all been done away by the purchase. Waite accordingly burned the lease. The plaintiffs did not know of the sale to Lewis until October, 1863, when they were informed of it by Wilson. H. B. Tatham tendered to Lewis \$5,000 his share of the purchase money. Lewis said he had bought on his own account and sold one half of it. G. N. Tatham went to Huntingdon and saw Wilson, who told him that Mrs. Waite had refused to sign the lease, but not that it had been destroyed. The next day Waite informed G. N. Tatham of the transaction, and told him that he supposed he had been selling to the plaintiffs, Taylor and Lewis, as being represented by Wilson. Lewis and Taylor afterward sold to C. & H. Borie for \$100,000.

The prayer was:—

1. That the purchase by Lewis be decreed to have been made in trust as to one half thereof, for the benefit of plaintiffs.
2. That Lewis may be decreed to account.
3. That he be decreed to pay over one half the net profits.
4. That Lewis and Wilson may be decreed jointly and severally to pay over one half part of the profits realized from the Waite farm.
5. That the defendant Wilson may be decreed to pay and make good to them the losses suffered in consequence of his fraudulent conduct in the premises.

There was no prayer as against Taylor's administrators.

Lewis in his answer stated at large, his connection with the transactions detailed in the bill. He denied the statements as to the influence of H. B. Tatham on him to purchase the property; denied that he ever agreed with any of the plaintiffs to visit Sinking Valley, averring that it was a matter between Taylor and himself; he denied that there was any arrangement that the purchase of the Waite farm was to be on joint account; denied that he knew Wilson was the professional adviser of the plaintiffs and upon belief denied that Wilson was their professional adviser; he averred that after visiting the Valley he declined to purchase Taylor's interest in the leases, and that afterward on Wilson's advice, he purchased the Waite farm, which was conveyed to him August 15, 1863, having theretofore informed Taylor that he had determined to make the purchase and that Taylor "should not be a loser by it."

Andrew M. Jones, one of the administrators of Taylor, answered partly on knowledge, and partly on information, that Taylor having made the discovery as to the zinc, but having no capital to invest, agreed with H. B. Tatham, that he, Tatham, should furnish capital for developing the deposits as an equivalent for Taylor's scientific knowledge; that Tatham having obtained the information, refused to allow Taylor an interest unless he would pay half the purchase money of certain land and leases which Tatham had obtained; that H. B. Tatham and Taylor visited the Valley in 1860, and were accompanied by Wilson as a friend (not as attorney), to introduce them to the residents of the Valley, and that several mining rights were purchased in the names of Tatham and Taylor; the answer averred that H. B. Tatham first sug-

gested to Taylor to sell out his interest; the answer denied that the visit with G. N. Tatham had any reference to the Waite farm; and that Taylor had any knowledge that Tatham had leased the Waite farm; that Taylor became acquainted with Lewis in 1863, with reference to a sale of his interest; the answer denied that Lewis was first informed by Tatham of the zinc deposit, and that he, Lewis, purchased Taylor's interest in the leases, and averred that he purchased the land, August 15, 1863, agreeing that Taylor should have one half the profits, and upon that basis subsequently settled with Taylor's representatives.

Wilson, among other things, denied that he acted as counsel for G. N. Tatham, but went with him to visit the valley through regard for Taylor; that Waite refused to lease on account of some stipulations in the leases, and Wilson asked him to sell. Wilson knew nothing as to G. N. Tatham obtaining a lease from Waite, and never undertook to procure leases for any of the plaintiffs; he did not know that Lewis intended to purchase Taylor's interest; he proposed to Lewis, in the presence of Taylor, to purchase Waite's farm, saying that it was worth \$40 per acre for farming purposes. After some conversation, Lewis agreed to buy the farm, Wilson having no knowledge of the lease to Tatham. Wilson was to have no interest in the farm, and nothing was said about compensation to him, or that Taylor was to have an interest in the farm. He denied that he told Waite that he was acting for any of the complainants or for Taylor; he denied that he had any authority to act for them or for Taylor. On the 5th of August, 1863, after some negotiation as attorney for Lewis, he closed an agreement for the purchase of the Waite farm for \$10,000, and on the 15th a deed was executed to Lewis. Wilson denied that he directed Waite to destroy the lease to Tatham; that he made any representation to Waite that the purchase was for any other person than Lewis.

A replication was filed, and C. H. T. Collis, Esq., appointed examiner. Much testimony, written and oral, was taken by him. By the testimony it appeared that in March and May, 1864, the plaintiffs sold to C. and H. Borie and the Keystone Zinc Company, for \$50,000, all their interest in the mining leases which they had in Sinking Valley, including the Waite lease. Mr. Collis was afterward appointed master.

He reported that the relation between H. B. Tatham and Wilson was of the most confidential character in reference to obtaining leases in Sinking Valley, and Wilson's understanding was that he was to be compensated; that H. B. Tatham depended almost entirely on the services of Wilson, who devoted a large portion of his time to the business in preparing and procuring leases; no fee had been received by him, nor had he presented a bill for services, but he could sustain an action for professional services. The master found, as a fact, that Wilson "was present with the plaintiffs and interesting himself on their behalf to secure a lease of the Waite farm, in June, 1863. He found that on the 18th of the same month, G. N. Tatham obtained a mining lease from Waite, and left it with him to obtain the acknowledgment of his wife; and that Wilson in the same month knew that G. N. Tatham was in negotiation with Waite for mining privileges. He further found that when Taylor visited the Valley in July, 1863, he did not know of the lease from Waite to G. N. Tatham; that the allegation of the plaintiff that the entire operations in the Valley were agreed to be on the joint account of Taylor, Lewis and H. B. Tatham, is not sustained by the evidence. He found that on the first of August, 1863, Wilson commenced a negotiation on behalf of Lewis, with Waite, for the purchase of his farm, which was consummated on the 15th by a conveyance of the farm to Lewis for \$10,000; that Wilson then advised Waite to destroy the lease, as being of no use to anybody after the conveyance, and in consequence the lease was afterward destroyed. He found specifically, as a fact, that at the time when Wilson negotiated for the sale of the Waite farm to Lewis, he knew of the existence of the lease executed by Waite to G. N. Tatham, but that he did not inform Lewis of it. The master further found that Lewis had no actual notice of the lease to G. N. Tatham; nor was he chargeable with constructive notice by reason of Wilson being his attorney and having knowledge of the lease. He further reported that if Lewis had purchased with such notice, the remedy of Tatham would have been to enforce the lease against the fee, but that after having sold the Waite lease to Borie for a valuable consideration, it was too late to follow it as against Lewis's profit in the sale of the farm, having failed to show they

were jointly interested in the profits. He therefore reported that there could be no decree against Taylor's representatives or Lewis.

As to Wilson he reported :—

“It is ascertained to my entire satisfaction that Wilson knew of the existence of the incomplete lease to George N. Tatham, and I am of opinion it was clearly his duty to have informed Mr. Lewis of its existence, and to inform Mr. Tatham that Mr. Lewis intended to purchase. But there is no evidence in the case which would justify me in reporting that under any circumstances the Tathams would have purchased the farm, and it is clearly established that Mrs. Waite would not sign the lease. What was there, then, of which Wilson's conduct deprived the Tathams? Simply of the benefit they might derive from the existence of a partly executed undelivered mining lease, which of itself was of very questionable value, but for which together with seven other leases, they were paid by the Messrs. Borie \$50,000. I can not, therefore, report a decree as against Wilson under this form of proceeding.”

The masters report was very elaborate, stating the facts very much at large and examining and giving his opinion very fully on the questions of law. The pleadings and what is above given of the testimony and the report, in connection with the facts as condensed in Judge Sharswood's opinion, will sufficiently present the case.

The master recommended that the bill be dismissed ; but as it appeared to him that the plaintiffs were warranted in prosecuting an investigation, that the decree should be without costs.

The plaintiffs filed exceptions to the master's findings.

The defendant also filed exceptions, especially, that he did not find that the plaintiffs should be charged with the costs.

The court at *Nisi Prius* dismissed all the exceptions, and made a decree in accordance with the master's report. The plaintiffs appealed to the court in banc, assigning the decree for error.

P. P. MORRIS and J. A. CLAY (with whom was W. H. RAWLE) for Tathams.

G. W. BIDDLE (with whom was H. WHARTON) for Lewis ;
PORTER for Wilson.

C. S. PANCOAST, for Taylor's representatives.

The opinion of the court was delivered March 3d, 1870.

SHARSWOOD, J.

A careful examination of the evidence has satisfied us that the master is fully sustained in the conclusions at which he arrived. As the questions involved were mainly questions of fact, in regard to which the report had the effect of a verdict, it leaves very little to be said in affirming the decree below.

The facts as now ascertained, may be briefly stated. The complainants were jointly interested with Taylor in the project of procuring mining leases in Sinking Valley. They engaged the services of the defendant Wilson as their attorney. Several leases were obtained by his assistance and intervention. As these leases were for a long term of years, by his advice, the wives of the lessors were in all instances required to join with a separate acknowledgment, in order to bar dower. Henry Waite, the owner of a farm, had executed a lease to George N. Tatham, one of the complainants, but it was in the names of himself and wife, and it was left in his possession to be executed and acknowledged by her.

Wilson had nothing to do with this lease, but George N. Tatham informed him of what had been done. Taylor was entirely ignorant of it. He proposed to sell out his interest to Lewis, and accompanied him with Lewis on a tour of exploration through the valley. In the course of it the Waite farm was visited. Neither Taylor nor Lewis were informed by Wilson of the existence of the lease. Lewis declined to buy out Taylor's interest, but authorized Wilson to purchase the Waite farm. There were no negotiations by the Tathams pending with that view, they had distinctly declined to take it at the price at which it had been offered. Wilson did purchase the farm for Lewis, and by his advice the lease was subsequently destroyed as of no value. After all these transactions

were fully known to the complainants, they sold out for a large sum of money all their interest in the leases in Blair County, including specially the alleged lease of the Waite farm. The master has reported, "that the evidence in the case does not support the allegation that it was understood that the result of Lewis's operations in the Valley should be for the joint interest of himself and plaintiffs, or of himself, plaintiffs and Taylor."

Assuming, as we must, this to be so, there is no principle of equity upon which Lewis can be made to account to the complainants for any share of the profits subsequently realized by him from the sale of the farm. The lease was clearly not binding upon the lessee. He could not have been compelled to accept it, without execution by the wife; neither could the lessor have been compelled to deliver it. It was evidently a condition of the bargain, that the wife should agree. It must be mutually binding on both parties, or neither. The lessor had a perfect right, when his wife refused, to cancel and destroy the instrument. How, then, can notice, actual, or constructive, of such a paper, affect Lewis with any equity, if there existed at the time of the purchase of the farm no confidential relation between him and the plaintiffs?

The existence of such a confidential relation is evidently the turning point of the whole controversy. If the lease had been a valid, subsisting lease, complete by delivery, without the joinder of the wife, the destruction of it by the lessor could not destroy the estate or term. The plaintiffs could have compelled the execution and delivery of another by proceeding against the lessor, and if Lewis was affected with constructive notice by the knowledge of Wilson, his attorney, it could have been established as against him, and he could have been obliged to confirm it. His remedy would then have been against Wilson, his attorney, for not having communicated to him the knowledge he possessed of it. It is not easy to see how Wilson incurred any responsibility to the Tathams for not having given actual notice to Lewis, if he was equally well affected by constructive notice. The extent of his liability would have been the costs of a proceeding to establish the lease as an incumbrance. But the complainants did not take this course to enforce their rights, if they

had any. Instead of this, they voluntarily parted with all their interest in their leases in Blair county, for a valuable consideration, to Messrs. C. and H. Borie, including specially this very lease of the Waite farm.

Had these gentlemen not been at the same time purchasers from Lewis, and had they not been fully cognizant of the facts, and stipulated for a transfer of the lease with the object, as Mr. C. L. Borie states in his testimony, that in addition to his desire to buy out their entire interest and to get rid of any competition that might arise, "to get rid of any claim they might pretend to have against this farm, as also of any law suit or quarrel which they might have with George Lewis," they would have been at the commencement of these proceedings the only parties injured, having a right of redress against Lewis or Wilson or both. In equity they stand in the shoes of the plaintiffs, so far as regards any claims or demands based upon the transaction of this lease. It is plain then that the whole matter of this alleged lease of the Waite farm is as irrelevant to the true merits of the controversy as was the question of the Earp lease of the Ueberoth farm in Lehigh county, in regard to which so much testimony was given before the examiner, with what object it is difficult to comprehend. Had the plaintiffs suffered any damage in not obtaining the full value of the Waite lease, on the transfer of it, in consequence of the negligence or misconduct of Wilson, as their attorney, upon which point however no evidence was given, no bill in equity could be maintained, as a full and adequate remedy existed at law in an action against him to recover such damages.

We think, however, from the peculiar circumstances of the case that there was some warrant for the bill, and we agree therefore with the master, that there should be no costs.

Decree affirmed, each party to pay their own costs.

DAVIS ET AL. V. HENRY.

(4 West Virginia, 571. Supreme Court of Appeals, 1871.)

Assignee of purchase money a proper party. On bill for specific performance, an assignee of parcel of the purchase money has an equitable interest, may be affected by the decree, and is a proper party defendant.

¹**Custodian of escrow papers.** The custodian of a deed in escrow refusing to deliver the same to any person, or threatening to deliver it to an adverse person, is a proper party to a bill in equity, for either specific performance or rescission.

Demurrer for misjoinder. If a party misjoined as defendant, do not complain, it is not for the other defendants to demur for such misjoinder.

Second contract tainted by original fraud. A second contract, annulling a first contract, which had been made upon fraudulent misrepresentations, the second contract being made under the continuing influence of such misrepresentations, is not a condonation of the original fraud.

Salting the dump—Fraudulent samples. A contract of sale, induced by representations that vendor in boring for oil had, at the depth of 108 feet, struck a vein of asphaltum coal from seven to nine feet thick, and had also in such well a "show of oil," which representations were fortified by pieces of asphaltum coal, brought from elsewhere and scattered about the oil well, and by a bottle containing a "show of oil?" *Held*, unconscionable and voidable until knowledge of the fraud and ratification after such knowledge.

²**Void and voidable.** A contract induced by fraud is not void, but voidable upon knowledge and election; and the proof as to vendee's knowledge of the fraud and his election to ratify or avoid being vague, the same was remanded for further testimony.

This was a suit in chancery, in the Circuit Court, Doddridge county, by Henry against Davis and others, the object of which was to enforce against Davis specific performance of a contract for the sale of a tract of land in Doddridge county, by Henry to Davis, and to subject the same to the payment of a large balance of purchase money claimed to be due.

The bill was filed in July, 1866, setting out a contract made in March, 1865, for the sale of a tract of 313 acres, at the price of 100 dollars per acre, payable as therein specified, and also 15,000 dollars of the stock of a company which Davis was to form for the purpose of mining for oil, upon this and adjoining lands. The contract also embraced the sale of an

¹ Deed delivered in violation of escrow instructions is void: *Hamill v. Thompson*, 3 Colo. 518.

² *Pearsoll v. Chapin*, 44 Pa. St. 9.

adjoining piece of land of 14 acres at the price of 20 dollars per acre. The bill alleged that Henry, on faith of this sale, had purchased a tract of land in Harrison county for 10,000 dollars, on the terms therein stated, but that Davis only paid 3,300 dollars of the purchase money he had promised, and made objections to proceeding further with the contract; that Henry was very anxious to perfect the sale, for reasons stated, and much negotiation ensued between him and Davis on the subject; that these negotiations resulted in a new contract, made on the 19th of July, 1865, by which Davis agreed to take the land at 23,300 dollars, instead of the consideration of the former contract, payable as therein provided, and 10 acres of the 14 at 20 dollars per acre; that this contract was reduced to writing, and declared the former to be thereby canceled and annulled; that Davis paid 10,000 dollars on the new contract, and Henry and wife executed a deed for the land and deposited it as agreed on; that Davis then paid 2,000 dollars more, agreed to be paid on the deposit of the deed, leaving unpaid on the last contract, 8,200 dollars, and proceeded to allege the refusal of Davis to pay this balance, prayed the enforcement of this contract and sale of land, and general relief.

Davis answered the bill in November, 1866. He admitted the contract of the 9th of March, 1865, but alleged that it was obtained from him by Henry by false and fraudulent representations that there was upon the land the mineral known as asphaltum coal; that this coal was the sole inducement for the purchase; that such representations were false; that there was no such mineral on the land, and that Henry knew it when he represented the contrary. He also admitted the contract of the 19th of July, 1865, and alleged that he made it for the purpose of getting rid of Henry's importunities for money, and that he only agreed to it for the purpose of getting an abatement of 8,000 dollars of the purchase money and the 15,000 dollars of the stock which was to be furnished him under the first contract. He charged that he had fully tested the question whether there was asphaltum coal on the land, and ascertained there was none. He alleged that both the contracts of March 9, 1865, and July 19, 1865, were tainted with fraud, and insisted that neither should or would be enforced against him. He admitted that he had not

paid the balance of the purchase money claimed to be owed, and that he ought not to be compelled to pay it, for the reason alleged.

After filing the answer, Davis also filed a cross-bill in the cause, setting up the same alleged fraud in falsely alleging the presence of asphaltum coal on the land, and the other matters alleged in his answer, and insisting that both the contract of the 9th of March and that of the 19th of July, were vitiated thereby, and praying the court to rescind the last named contract, and decree that Henry should refund the amount which he had received upon the contract.

Henry answered the cross-bill. He denied all the allegations of fraud which it made. He did not recollect that he ever spoke with Davis about asphaltum coal being on this land or ever showed him any; but stated that in the days of inflation and excitement in which these contracts were made, rumors were rife of such coal being found anywhere and everywhere.

He denied explicitly that the contract of the 19th of July, 1865, was made under the circumstances or for the reasons alleged by Davis; he stated, whatever were the rumors or had been the talk about asphaltum coal prior to this time, Davis had, prior to the 19th of July, 1865, satisfied himself that it was not to be found on this land; that for this reason he had urged Henry to abate the \$8,000 and to give up the \$15,000 of stock, and promised to pay the balance in a short time; that Davis had then given up all idea of coal on the land, and had gone back to his original purpose of boring for oil; that he had fully satisfied himself of the mineral value of the land, and agreed that he would take it if Henry would make the abatement proposed, "coal or no coal, oil or no oil." And denying all fraud and wrong whatever in the contract of the 19th of July, he insisted upon its due execution and the relief prayed for in his bill.

To the answers of the three defendants to the original bill, and of the defendant Henry to the cross-bill, replications were filed by the complainants respectively.

The depositions of very many witnesses were taken by both parties upon the various questions of fact made by the pleadings in the cause.

The causes (on the original and cross-bills) came on to be heard on the 8th of May, 1869, upon the original and cross-bills, the answers thereto respectively, replications to the same, exhibits filed, and the depositions, with certain exceptions thereto. Whereupon the court was of opinion that Davis was liable for and should pay the balance of the purchase money due upon the contract of the 19th of July, 1865, which was ascertained to be \$8,200, with interest from the time when the same was made payable, and decreed accordingly; and that a sale of the land should be made on default of the payment thereof, with the costs of suit. The court also dismissed the cross-bill of Davis with costs.

The contract of the 19th of July, 1865, was indorsed on the paper on which the former contract was written, and was placed in the hands of Benjamin F. Martin, Esq., for safe-keeping, and it was alleged in the bill that he "gave out in speeches" that he considered Davis was solely interested in it, and that he would surrender it to him if demanded. Martin was made a party defendant to the original bill. The bill also alleged that in pursuance of the second contract the plaintiff and wife executed a deed to Davis, and delivered it to T. K. Knight, who happened then to be clerk of the Circuit Court of Doddridge County, which fact the latter certified to Davis. That Knight refused to deliver the deed thus made to the plaintiff, or to any one, until authorized to do so by the court. He was also made a party defendant. It was further alleged in the bill that the plaintiff had assigned to one Benjamin Wilson, Esq., the sum of \$800 of the purchase money due from Davis, and the benefit of the contract to the extent of the sum so assigned, and that Wilson held an assignment in writing thereof, and claimed the benefit of the same. He was also made a party defendant.

The depositions taken in the cause were quite voluminous and in many particulars contradictory. It appeared, however, to be established, that the plaintiff represented that he had found or struck a vein of asphaltum coal, from seven to eight feet in thickness, in a well he was boring on the land for oil, at a depth of about 108 feet; this he represented to several parties, as well as to the defendant, before and at the time of the original contract in March, 1865. It also appeared that

the plaintiff had procured some specimens of asphaltum coal through one Baker, whom he employed for the purpose, from an asphaltum mine in Ritchie county, which he told Baker, in the hearing of the witnesses Bee and O'Donnell, he wanted to put about the well he was boring, to enable him to sell his farm; that witness O'Donnell saw at Baker's store, after his return from the Ritchie county mine, some lumps of asphaltum which he had brought home in his carpet sack, and also some small pieces which were brought there by the plaintiff, which he said he got from his well. That defendant Davis had sunk four new wells on the land, and had reamed out the old one bored by Henry, enlarging the latter from a four to a six inch hole, to the depth of three hundred and sixty feet. That three of the new wells were within fourteen inches from the center of the hole bored by Henry, and varied from 129 to 242 feet in depth; that no asphaltum or other coal was discovered, except a small vein resembling bituminous coal of eight or ten inches in thickness, at a depth of about 117 feet. That Henry also stated that he had indications of oil in the well, and exhibited specimens in a bottle, but none had ever been observed by those who were engaged in boring, except on one occasion when their attention had been called to it by Henry, and none was ever seen afterward.

The testimony as to the representation of Henry, made to Davis, and in his presence, concerning the finding of asphaltum, and exhibiting specimens alleged to have been so found, was abundant. It was also shown that Henry stated in the presence of witnesses, in April, 1865, that he had told Davis, prior to the consummation of the purchase, that he had discovered while boring for oil, an asphaltum vein of coal from seven to nine feet thick, 108 feet below the surface.

In relation to the annulling of the contract by the renewal, or new contract, of July 19, 1865, the material testimony for Henry, was as follows: John Y. Bassel proved that about the middle of July, 1865, he was at the place where they were boring the wells; they were working a well between three and four hundred feet deep; said they were boring for oil, and when the pumpings were poured out, all present examined for oil indications, defendant Davis among the rest. Witness understood from Davis and Henry, that they were about

to have a law suit about the property, Davis claiming that Henry had misrepresented the property, concerning the valuable mineral deposit of asphaltum; to which Henry replied that there was an existing contract, in which the land, and not the coal, was stipulated for; but Davis still refused to take the property according to contract, and insisted that "Henry should abate a part of the purchase money, as he had no longer hope of coal; with a fair abatement, his chance for oil might relieve him." He understood, from the general tenor of their conversation, that a compromise was decided upon, and that they were going to Grafton together to settle it.

Israel J. Kinney deposed that he was deputy sheriff of Doddridge county, in July, 1865; that in June of that year a summons was placed in his hands, in favor of Henry, against Davis; went to serve it in Greenwood, near where the land in controversy lay; saw Davis there, and heard Henry say to him that he would sue him, to which the former replied, that he would prefer not being sued; did not serve the summons, because the parties made a compromise; Davis agreed, as witness recollected, to take the land, "oil or no oil, coal or no coal." Henry instructed witness to return the summons, as the matter was satisfied, and he would pay him the fee of witness. Witness understood this arrangement to take place, but could not state that he heard Davis say anything, but the understanding above related, passed between them.

On this point the defendant introduced the deposition of B. F. Martin, Esq., who stated, that some time in the summer of 1865, the parties, Henry and Davis, came to his office, in Pruntytown, Taylor county; they wanted a contract written in respect to the land in controversy; witness wrote it on back part of the original contract; the contract abated about \$8,000 in money, and \$15,000 in stock, mentioned in the first contract; thought Davis said when they first came to him, that they had agreed on settlement of the controversy between them, or wanted to settle the difficulty; that often before the writing of the second contract, Henry assured Davis, in presence of the witness, and also assured witness, as attorney for Davis, when Davis was not present, that the coal, or asphaltum, would surely be found by Davis, at distance of 108 feet, or thereabout, beneath the surface; that he also made

like assurances to Davis, while witness was writing the second contract, *i. e.*, that Davis "would find the coal, or asphaltum, at or about the depth aforesaid, if he bored for it." It was proved that Davis continued his operations of boring until December, 1865.

Davis appealed to this court.

Hon. C. J. STEWART, Judge of the Circuit Court of Doddridge, presided on the hearing of the case.

FAULKNER and BOGGESE, for the appellants.

LEE, LEWIS and EDMISTON, for the appellee.

MOORE, J.

The appellant, Henry G. Davis, by his counsel, insists:

1st. That the demurrer to the original bill should have been sustained, because of improper joinder of Wilson and others with him.

2d. That the original bill should have been dismissed at the cost of complainant, Henry, because of the false and fraudulent representations made by him in relation to the land sold to said Davis.

3d. That the decree in the cross-bill should have canceled the contract of sale of July 19, 1865, with costs, and not have dismissed the bill.

4th. That the court ought to have directed an issue, to try by jury the question of fraud, and whether said Davis had discovered the fraud prior to the 19th July, 1865.

The appellee, Henry, by his counsel insists:

1st. That the decree is right, both in giving the relief prayed for in the original bill, and in dismissing the cross-bill with costs.

2d. That the evidence offered by Davis to prove false and fraudulent representations on the part of Henry to procure the contract of the 9th March, 1865, is insufficient to establish the charge made against him, and that the evidence tending to prove such representations is unworthy of credit.

3d. That the charge of fraud in the contract of March 9, 1865, is not supported by the proof in the cause.

4th. That if there had been really any question between Davis and Henry about representations as to the presence of asphaltum coal on the land sold, previously to the second contract, yet when that contract was made on the 19th July, 1865, it was fully ascertained by Davis that it was not there, and that contract was made without reference to the presence of such coal on the land.

5th. That said contract was made with reference to mining for oil, the original object of pursuit.

6th. That if there be anything in the evidence tending to raise the impression of such representation made by Henry on the order of trade and dealings, as ought to be construed by the court to affect the first contract of March 9, 1865, with fraud, yet that such fraud, if any, was already "condoned" by the second contract of the 19th July, 1865, for a valuable consideration, to wit: An abatement of \$8,000 in cash, of the purchase money, and \$15,000 of stock in the company, which Davis was himself to form for the purpose of working this and adjoining lands.

7th. That it is too late for Davis now to call in question the validity of the contract of July 19, 1865.

It appears, on inspection of the original bill, that Henry G. Davis, Benjamin Wilson, Benjamin F. Martin and Taliaferro K. Knight are made defendants. Davis was the principal defendant, on account of privity in the contract which Henry seeks the specific execution of; Wilson was made a party because Henry had assigned to him \$800 of the money he was to receive from Davis on the contract, "and the benefit of the said contract to the extent of the said sum so assigned," and said Wilson had forbidden Davis from paying the same to said Henry; Martin was made a party because he had in his possession, as the mutual friend of Henry and Davis, the contract of March 9, 1865, and July 19, 1865, which Henry prayed he should be required to produce, and place the same within the control and at the disposal of the court; Knight was made a party because he held, as an escrow pursuant to the contract of July 19, 1865, the deed which Henry and wife had made conveying the land to Davis.

Justice Story in his admirable work on Equity Pleadings, § 226, b, says, "in the case of a common bill for the specific

performance of a contract of sale of real estate, the only proper parties in general are the parties to the contract itself; special cases may indeed exist, in which the rule may be otherwise, but they stand upon their own peculiar grounds." In this case, Davis' privity in the contract sought to be enforced, makes him principal defendant. Wilson, by virtue of the assignment made to him, was entitled to the \$800, with the interest due thereon, and having that equitable interest, he was in a situation to be affected by the decision of the court; it was, therefore, proper to make him a party defendant, that he might the more readily protect his equitable interest, which might otherwise be decreed to Henry, who had assigned to him. Wilson had also notified Davis of the assignment, and forewarned him not to pay the \$800 to Henry; hence it was essential to Davis' protection that the rights of Wilson in that respect should be adjudicated in this cause.

It is also a well settled principle in equity, that the person having the beneficial interest is a necessary party, which illustrates "the ordinary doctrine that the real parties in interest shall be brought before the court, whenever their interests may be affected": Story's Eq. Pl., §§ 153, 154, and notes.

As to Martin and Knight, it is true, they were in one sense simply witnesses, and had they occupied only that relationship, they would not have been proper parties; but they stood in a nearer relationship—a *quasi* trusteeship. Martin had been constituted, as the mutual friend of both Henry and Davis, custodian of both contracts; Knight held, as an escrow, the deed which Henry and wife had made to Davis. It was, therefore, their duty to act disinterestedly between Henry and Davis, and in good faith execute impartially the trust confided in them. The bill charged as follows: that "Martin holds said paper writing, the sole evidence of said contract, in his possession, but gives out in speeches, that he considers the said Davis is solely interested in the same, and that he will surrender the same to him if he demands it"; that Knight "holds the said deed so deposited with him as aforesaid, and declines to deliver the same—either to your orator or to the said—,until ordered to do so by the order of your Honor,

and the said Davis combines and confederates with other persons, to your orator unknown, to baffle, deceive and defraud your orator in the premises."

The bill also prayed that said Martin should be required to produce said contracts, and place them within the control and at the disposal of the court, and that said Knight be required to produce the deed so as to be at the disposal of the court. On demurrer, the allegations of the bill are taken as true, and the bill thus showing such inequitable conduct, and the necessity for the production of the contracts and the deed, as proper exhibits in the cause, so essential to the final adjudication thereof, whether the decree should be specific performance or rescission, it seems to me that viewed from this standpoint, there is such a special case in this instance as equity will embrace, and should sanction the joinder of defendants. For these reasons, and upon the principles laid down in the standard works on equity pleadings, I think there is not such a misjoinder of defendants in this case as would have justified the court in allowing the demurrer, and that the court did right in overruling it: Story's Equity Pleadings, §§ 221, 229; Mitf. Eq. Pl. side page 162.

Neither Wilson, Martin or Knight demurred; Davis was not the proper person to demur for misjoinder of defendants, and the demurrer was properly overruled for that reason also: Story's Eq. Pl., § 544.

This brings us to the case, as it appears on the contracts, and evidence of the manner in which they were obtained. It is argued by appellant that his vendor, the plaintiff in the original bill, by device and false representations, took an unconscientious advantage of him in procuring the contracts; in short, practiced positive, actual fraud.

If that be true, then the court erred in enforcing the contract, because it is a well settled principle that a court of equity will never assist a wrong-doer in effectuating his wrongful and illegal purpose, which is the spirit of the maxim, that "He who seeks equity, must do equity": 1 Story's Eq. Jur., § 64, *e.* On the other hand, if the contract was not founded upon false representations, or if Davis assumed to judge for himself, and did not use the means of knowledge within his reach, but entered into the contract through unreasonable

negligence or indiscretion, *caveat emptor* applies, and as to him, equity closes its doors: *Idem*, § 200, *a*.

Without going into detail, it seems to me the weight of the evidence is against Henry; that he obtained the first contract from Davis through artifice and misrepresentations is, from the depositions, unquestionable. That it was such a fraud as could not have been detected by any reasonable diligence on the part of Davis, a ruse so studied, and an imposition, though gross, yet so well concealed, was well calculated to deceive the most vigilant and discreet, especially at a time when the wonderful mineral developments of the country were so exciting.

It is clear that Henry, before the making of said contract, had represented, not only to Davis, but to others, that in sinking the well on the land, he had struck, at the depth of 108 or 110 feet, a vein of asphaltum coal of eight or nine feet in thickness. He even exhibited specimens of it to different parties, sent samples of it to R. W. Lowther, who showed it to Davis; and when Davis and Lowther visited the well, they found small pieces of the coal, similar to the said specimens, scattered about the well, mixed with the borings.

Henry then told them the asphaltum pieces had been "taken out of the well, and that they had struck a vein of the coal at about 108 or 110 feet below the surface, of nine feet in thickness." At the same time he stated to Davis and Lowther, that "they had a show of oil in the well." This evidence comes direct home to Henry; and upon those representations, thus deliberately made by Henry, Davis entered into the contract for the purchase of the land, and at great expense and labor explored it. He was diligent in the exploration. He sank four wells: the first, one third of a mile from the Henry well, 242 feet deep; the other three within the distance of 14 inches of the center of the Henry well, one to the depth of 130 feet, the second 129 feet, and the third 227, but found no indication of asphaltum or oil. He then reamed out the Henry well, increased the diameter thereof two inches, thus giving it six inches diameter, and in addition sank the well 230 feet deeper than Henry had it, making a depth of 594 feet, and still found no indications of asphaltum coal or oil, thus demonstrating the falsity of the representations made to

Davis. The first contract was unconscionable and fraudulent on the part of Henry, and could not have been enforced in equity.

But it is claimed that Davis has abandoned his right to abrogate the contract, by again bringing himself into contact with Henry by the modified contract of July 19, 1865. In the case of *Morse v. Royal*, 12 Vesey, Jr., 373, Lord ERSKINE meets this position directly. He says: "As to the doctrine of confirmation, it stands upon several authorities; where a man having been defrauded, with complete knowledge, chooses to come again in contact with the person who defrauded him; abandons his right to abrogate the contract; and enters into a plain, distinct transaction of confirmation. But when the original fraud is clearly established by circumstances not liable to doubt, a confirmation of such a transaction is so inconsistent with justice, so unnatural, so likely to be connected with fraud, that it ought to be watched with the utmost strictness, and to stand only upon the clearest evidence, as an act done with all the deliberation that ought to attend a transaction, the effect of which is to ratify that which, in justice, ought never to have taken place." The same doctrine is affirmed in Sugden on Vendors, pp. 287, 288.

It seems to me Lord ERSKINE has stated the true principle, and that this case fairly hinges upon that doctrine. If Davis entered into the contract of July 19, 1865, with complete knowledge of the fraud practiced upon him in the first contract, which he was at liberty to rescind, he will be bound by it: Sugden on Vendors, 287, and cases cited; Story's Eq. Jur., § 306. The first contract was not absolutely void, but voidable, and therefore capable of confirmation, where the party is fully informed—acts with his eyes open. But on the other hand, if Davis was not fully informed as to the fraud at the time of the contract of July 19, 1865, or was "still acting under the pressure or influence of the original transaction, or labored under the delusive opinion that the first contract was binding upon him, and was thus induced to enter into the second contract, he is not bound:" Story's Eq. Jur., § 345 and note 2. And it seems to me he would not be bound by it if he was influenced to enter into the second contract by the declarations which Henry made before, and at the time of the

making of said second contract that Martin testified to, viz.: "That the asphaltum would be found as he had represented at the time of the original purchase," notwithstanding Davis doubted the truth of the statement, because that would be a continuation of the fraud in order to obtain from Davis a new contract by misrepresenting facts which Davis was not fully informed of, but relied on the good faith of Henry.

Taking this view of the case, I do not deem it necessary to discuss more fully the points raised by the several counsel; and although I am inclined to the opinion that the second contract can not be considered as an abandonment of the right to abrogate, or as a distinct transaction of confirmation, and that upon the evidence, the court below would have perhaps acted properly, had it decreed a rescission of the contract, yet, as the depositions are not entirely satisfactory, but vague and indefinite as to the fact whether Davis was fully informed at the time of making the second contract that he had been defrauded by Henry, and that he intended the second contract to be a distinct transaction of confirmation, I think it would be proper to remand the cause to the circuit court, that the question may be settled by more definite testimony; or as this is clearly a case in which it would be eminently proper, by an issue out of chancery. Therefore, as the evidence is not sufficient to sustain the decree of the court below, I am of opinion that the same should be reversed, with costs, and remanded to the court below for further proceedings to be had therein.

The other judges concurred.

Decree reversed.

WHITING ET AL. V. HILL ET AL.

(23 Michigan, 399. Supreme Court, 1871.)

¹ **Misrepresentations, not operating to deceive, no defense.** A misrepresentation, however fraudulent, can be of no avail as a defense, unless it served to deceive the party at the time he became fixed by the treaty. If the party claiming to have been defrauded, before being tied and while in a situation to retreat without prejudice, in any manner becomes acquainted with the truth, the misrepresentation is no defense to the contract.

¹ The same, if grantee have knowledge of grantor's fraudulent intent: *Bartles v. Gibson*, 17 Fed. 293.

¹ Defects in salt-well known, by test, to the vendee. Where, in defense to a bill foreclosing purchase money mortgage, damages were claimed on account of fraudulent misrepresentations at the time of the purchase of the salt property in question, in substance that the brine was of ninety degrees strength, free from gypsum and sufficient in quantity to supply three or more salt blocks; and the evidence showed that defendants, pending negotiations, were, for fifteen days after such representations were made and before they became bound to the purchase, in possession and steadily working the well; that they were familiar with the business of salt making and had themselves discovered that the brine contained gypsum and was deficient in strength and quantity, such misrepresentations, if made as alleged, would be no defense to the bill.

Appeal in chancery from Bay Circuit.

This bill was filed by Jonathan Whiting, Hiram Wood, George B. Powell, Charles D. Middlebrook and James Remington against Isaac H. Hill, Stacey B. Hill and Melbourne S. Hale.

The case is fully stated in the opinion.

MARSTON & HATCH and G. V. N. LOTHROP, for complainants.

GRIER & McDONELL, ASHLEY POND and S. M. GREEN, for defendants.

GRAVES, J.

On the 12th of July, 1864, the complainants owned twenty-three acres and a fraction of land, having a front on Saginaw river, and upon which land were a salt well, two salt blocks, certain buildings, an engine, machinery and implements for manufacturing salt. The works had been used and known as the Saratoga Salt Works, and the complainants were then, and for some time before had been, carrying the same on, and in so doing conducted the business as copartners of a private firm under the name of the Saratoga Salt Company; but the complainant Remington was the only partner residing in this State, and he lived near the works and was the local manager for the owners in prosecuting the manufacture of salt. The other joint owners and copartners resided in the State of New York. On the day first mentioned, the defend-

¹ *Perkins v. Rice*, 6 Litt. Sel. Ca. 218; *Post Rescission*; *Vigers v. Pike*, 8 Cl. & Fin. 562; *Campbell v. Fleming*, 6 M. R. 395.

ant Stacey B. Hill, and one F. M. Hale, a brother of defendant Hale, and who assumed to act in the interest of the latter, called upon complainant Remington at the salt works and entered into a negotiation with him for the purchase, by defendants, of the whole establishment, together with a quantity of wood then also owned by complainants and designed for the salt works. The Hills and F. M. Hale were at the time acquainted with several wells in the vicinity and with the business of salt manufacture there, and they desired to buy this establishment in order to engage in that business. The parties who thus personally began negotiations proceeded to look about the premises and to inspect the well and machinery and while so doing and conversing about a trade, the complainant Remington exhibited and passed to Hale, a printed circular describing the property, and which had been prepared to attract a purchaser.

The defendants also claim that during this interview Remington made certain oral representations about the property. An arrangement was finally concluded the same day, which contemplated a sale to defendants, and an instrument, under seal, was drawn up to serve as an agreement to carry out the arrangement. But this instrument, purporting to be made on the one part by the Saratoga Salt Company, was subscribed for the latter by Remington alone, and then only by affixing the company name by himself, as treasurer, while the Hills subscribed in person and F. M. Hale added the signature of his brother, Melbourne S. Hale. By the terms of this instrument the property was to be sold to defendants for eighteen thousand dollars, of which five thousand dollars was to be paid instantan, and the residue on or before the 12th of July, 1866, with interest at seven per cent. per annum, and which residue and interest were to be secured by bond and mortgage on the property. It was also stipulated that defendants should have possession of the dwelling house on the land on or before the first of the ensuing September, and of the remainder of the property immediately, and that a warranty deed, conveying the premises, free from incumbrances and containing the usual covenants, should be given on receipt of the five thousand dollars. There was likewise a covenant on the part of the salt company that the "blocks, engine, pumps, etc.," were

then in complete running order, except the east block. The remaining portions of the writing do not require to be noticed here.

This instrument having been thus prepared, but before any act equivalent to delivery, a conversation sprung up as to Remington's authority to bind his copartners and co-owners, and it was ascertained that he possessed no such power. It was thereupon arranged that the five thousand dollars and the writing should be left at a named bank until Remington's associates should be heard from, and until a proper deed should be delivered; and pursuant to that understanding the writing was placed in the bank, and four thousand dollars of the five thousand dollars to be paid, in hand were put there with it, and in a short time afterward the defendants made up the sum in bank to five thousand dollars.

The defendants immediately entered into possession of the well and other property, except the dwelling house.

A few days subsequently Remington's associates communicated to him their disapproval of some of the terms to which he had consented, and which had been inserted in the writing, and among other things insisted that the sum of thirteen thousand dollars to be secured by bond and mortgage should be paid in two installments instead of one, and that three thousand dollars of the amount should be paid in the season of 1865; and when the bond and mortgage came to be executed this change was made. At length, on the 18th of August, 1864, the deed and bond and mortgage were delivered—the execution of the latter having been acknowledged on the same day.

The bond and mortgage provided that three thousand dollars should be paid on or before the first day of August, 1865, and ten thousand dollars on or before the 12th day of July, 1866, with interest at seven per cent. per annum, computed from the first day of July, 1864.

The defendants, having gone into possession on the 12th of July, 1864, continued to run the works from that time until the payment of three thousand dollars became due in August, 1865, at which time Mr. Hatch, acting for complainants, called for the payment, but the defendants refused to pay and suggested for the first time to complainants that the latter were

guilty of fraudulent misrepresentations on the sale of the property. The defendants persisting in their refusal to make further payments, the bill in this cause was filed on the 22d of March, 1866, to foreclose the mortgage, and the defendants answered and set up that material representations contained in the printed circular, and others made orally by Remington at the time of the negotiation, and on which the defendants relied, were false, to the knowledge of complainants, and intended to defraud, and that the deception thus practiced on defendants had caused them great damage, which ought to be allowed them in this suit.

The court below sustained the defense and the complainants appealed. The record is voluminous, but the foregoing outline will sufficiently indicate the nature of the case for the purpose of this opinion. The alleged representations related to the quality and condition of the well and the condition of the salt blocks; but the main subjects of complaint and, indeed, the only ones which will bear examination, are found in those allegations which set up deceptions concerning the strength and quantity of the brine and its freedom from gypsum.

There is no room for pretense that defendants were deceived by any representations relating to the condition of the blocks. In view of the facts disclosed, the inference is irresistible that defendants did not trust to any statements respecting the then existing condition of these structures. They were open to inspection and were examined and used by defendants, who appear to have been well informed on such subjects and qualified to form a correct judgment about them. Besides, it is seen that the writing expressly excluded the east block from the condition said to have been imputed to it by the representations, while the west block is confessed to have been in a satisfactory state.

We may therefore dismiss from the case every consideration depending upon representations as to the condition of the blocks. As before intimated, the weight of the defense rests upon imputed misrepresentations as to the quantity and strength of the brine supplied by the well and its freedom from gypsum, and an examination of the case upon that theory will cover the whole equity of the answer. The defendants aver, in substance, that complainants, knowing the same

to be false and intending to defraud, untruly represented that the well contained no gypsum; that the brine was of ninety degrees strength and of sufficient quantity to supply three or more blocks, and that the defendants, believing these representations to be true, relied upon them and were thereby induced to purchase the property and to agree to pay the price specified.

The fact of making some of the representations here noticed is controverted, and especially in the form and to the extent given to them in the answer; and the testimony relating thereto is contradictory, while the evidence bearing upon the knowledge of complainants of the untruth of the proved representations is conflicting and unsatisfactory. But the opinion formed of the defense, in another aspect of it, enables us to dispense with any discussion of these topics. We shall therefore concede, for the purpose of the case, that the representations set up, and a knowledge by complainants of their untruth have been shown by the evidence. It is very essential at the outset to bear in mind one of the distinguishing elements of this defense,—an element not remarked upon by defendants' counsel, but which they seem to have recognized in the answer and generally in the conduct of the case. The defendants do not ground themselves upon a warranty or guaranty that the well or works should continue, after the trade, to perform in a particular manner, or maintain pre-understood or determinate conditions. But they base their claim upon an alleged deception respecting the then state of things. They aver in substance and effect, that at the *date of the trade* the facts were materially different from what they were led to believe they were by the false representations of complainants.

It is true that evidence was given, and properly so in this case, to show the state of things at other times. This proof was pertinent on account of the secondary effect it might yield in raising an inference, more or less forcible, that the conditions, claimed to have been imputed by the representations, did or did not exist at the *critical* time, and particular evidence of the same class was admissible, as bearing upon complainants' knowledge of the untruth of the representations and upon the question of damages. But none of the evidence

respecting the state of things at other times could in any way change or enlarge the fundamental issue, and the very nature of the defense prescribes the necessary limits of that issue.

Considering the case in the most favorable light for defendants, we are therefore to inquire whether the imputed misrepresentations, if made, could have affected the transaction in such manner as to give rise to the equity asserted by defendants. Now these propositions will not be disputed. A misrepresentation can be of no avail unless it serves to deceive the party at the time he becomes fixed by the treaty, and he can not claim to have confided in a statement as true, which at the same time he knew to be false. Hence, however fraudulent and wicked a representation may be, if the innocent party, before being tied and while in a situation to retreat without prejudice, in any manner becomes acquainted with the truth, the misrepresentation will not be a ground of defense against the contract: *Irvine or Douglas and others v. Kirkpatrick*, in House of Lords, 3 Eng. L. & E. 17. In view of these considerations it becomes expedient to ascertain in what stage of the business and at what time the defendants became so fettered as to preclude their retreat without incurring too great a loss from the representations of complainants. The written instrument of the 12th of July, 1864, was not binding, and the evidence demonstrates that Remington and the defendants not only understood that it was not binding, but acted upon the assumption that it possessed no legal force. It was left at the bank to await the action of the non-resident owners of the property, and subject to a change of terms, which in fact was afterward effected. The money to be paid down by the terms of the instrument was also, by the verbal arrangement, to be left at the bank to await a conveyance, and but four thousand dollars of this sum was placed there at the time. The minds of the complainants and defendants did not meet and assent to the stipulations of the instrument, either in fact or in contemplation of law, and this was well understood and recognized by Remington and defendants. Notwithstanding the preparation of the paper, and notwithstanding that the parties present anticipated that a sale would eventuate in substantial accordance with the terms of the writing, and that they proceeded to conduct themselves

conformably to that idea, it is too clear to be disputed that the transaction was incomplete, and that no binding engagement occurred on the 12th of July. We must then pass beyond this date for evidence of any act adopted to oblige the parties, and in so doing, we search the record in vain for any writing for that purpose until the 18th of August, when the deed and bond and mortgage were delivered. The parties appear to have left the business in a shape to admit of no compulsory remedies until that time, unless it should be claimed that the reception by Remington of the first payment changed their position in that regard, and the evidence does show that he received the five thousand dollar payment on the 28th or 29th of July. As it may be contended that this payment so altered the situation of the defendants as to prevent their throwing up the business without serious injury, and as the circumstances in evidence must lead to the same result whether the 28th of July or the 18th of August is taken as the turning point, we may waive all objections which may obtain to conceding the date of the first payment as the proper time.

Conceding, then, that complainants represented that the well was free from gypsum, that the brine was of ninety degrees strength, and in quantity sufficient for three blocks, were these representations believed and confided in by defendants on the 28th of July? These representations were then sixteen days old, and during the last fifteen days, at least, the defendants had been in actual possession of the well and steadily working it. The Hills were acquainted with the business of salt-making, and with the wells in that neighborhood, and were practically familiar with the manner of working the wells. Their knowledge on the general subject was ample, and they had abundant opportunity to verify the truth of whatever representations had been made of the conditions then existing. This knowledge and this opportunity they had between the 12th and 28th of July; and the evidence shows that in that time they used both and had their eyes open to ascertain to what extent the actual corresponded with the asserted conditions.

Now, it was part of defendants' case, to show that the representations imputed to complainants were untrue when made, or at least on the 28th of July, because if they were true at the critical time, the main element in the groundwork

of the defense, namely, the untruth of the representations, would be wanting. In order to substantiate the charge that the representations were false at this period, the defendants not only submitted evidence to prove the state of things at other times, but also introduced defendants' agents and the Hills themselves, to testify concerning the facts as they appeared to them on and before the 28th of July; and the evidence thus furnished, as defendants argue, establishes the proposition that the representations were then untrue. This evidence embraced the personal observations and discoveries of two of the defendants and a number of their agents, made between the 12th and 28th of July; and certainly, if credited, it shows that these witnesses then discovered gypsum, and that the brine was greatly deficient in strength and quantity. This proof we must either credit or reject. If we reject it, the defendants' position is not sustained. If we give it credit, it shows necessarily that defendants became acquainted with the real facts in season to recede. They were then in possession under verbal arrangements without having paid anything, and they held in their hands the products of the well. We do not overlook the circumstance that defendants now claim to have been led to an erroneous view, at this time, of the true meaning of appearances, by new statements of Remington, to which they trusted. This explanation is too narrow, and fails to meet the necessities of the case. It is quite out of joint with the proved experience and information of the Hills, and the grounds they seem to have had for trusting to the knowledge of Remington, and it does not harmonize with the course of defendants after, as they assert, the defects were conclusively developed. It is inconsistent, also, with the statements of Isaac H. Hill to, and his conduct toward, defendant Middlebrook in February, 1865. At this time, the defendants, according to their evidence, had fully ascertained that the well contained much gypsum, and that the brine was greatly deficient in strength and quantity; and yet Mr. Isaac H. Hill then gave Middlebrook to understand that the three thousand dollar payment would be made at maturity: See *Deuel v. Higgins*, 9 Mich. 223.

There is a further difficulty in the way of this explanation. From the evidence given by defendants as trustworthy, it appears that their agents, employed at the works and expert in

such matters, found out the defects before the 28th of July. And when we reflect upon the nature of the subject, the position and relation of the parties and the surrounding circumstances, we think it reasonable to hold that the knowledge of the agents was shared by the principals. We have not failed to observe that defendants' evidence tends to show that the well grew increasingly worse from the 12th of July, and that defendants claim they were not aware that the injurious conditions were permanent until long after that time. But we observe, also, that the right to defend on the ground taken by the answer depended upon the existence of damaging deviations before the mortgage, and not upon the permanence or subsequent enlargement of the deviations; and that defendants' ignorance that the unfavorable conditions were permanent and growing could not break the effect of their seasonable knowledge of the conditions as they were on the 28th of July.

We have not detailed the evidence, which covers more than six hundred printed pages, nor have we followed counsel in their elaborate quotations from it, but have dwelt rather upon its bearing and effect; and the opinion it leads us to form is, that the defendants, on the 28th of July, 1864, had knowledge of all the deviations from the represented conditions which they have proved then existed.

Having reached this conclusion it follows that the decree below must be reversed, with costs, and that complainants must recover the principal and interest secured by the bond and mortgage. As the special commissioner in the circuit court, under an order there made, ascertained and reported the amount, which he found to be eighteen thousand four hundred and forty-five dollars and sixty-six cents on the 7th day of May, 1870, and as neither party has complained of this part of the report, a further reference will be unnecessary, and the usual decree of foreclosure and sale, which may be entered, may proceed on the basis of this portion of that report. The decree, however, should give the defendants three months before the sale for the payment of the sum reported, with interest at seven per cent. per annum from the seventh of May, 1870, and the case should be remitted to the court below for the execution of the decree.

The complainants will recover their costs in both courts.

The other justices concurred.



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AGENT.

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2. *Organizers, acting as corporate agents, can not take profit against the company.*—Parties purchased oil land, and shortly afterward, with others, formed a corporation to whom the land was conveyed at an advance. If the purchasers acted as agents of the company in purchasing the land, they could not charge a profit against their principal. They would be in the same position if they assumed so to act without precedent authority, if their doings were accepted as the acts of agents by the company. *Simons v. Vulcan Oil Co.*, 633

3. *Payment to agent.*—The receipt of money by an agent is *prima facie* evidence of the receipt by a principal; and the receipt by one partner, that it is for the firm. *Id.*

ALIEN.

1. *Alienage, a matter between the subject and ruler.*—Alienage is not a disability of which advantage can be taken by a citizen in a contest with an alien. It is the office of the government only, to declare a forfeiture of the alien's estate. This rule (the court seem to intimate) would apply to the case of possessory mining claims on the public domain located or purchased by aliens and citizens adversely to each other. *Territory v. Lee*, 248

APPURTENANCES—See FIXTURES, 3.

ASSESSMENT—See FORFEITURE, 19, 23; FRAUD, 41.

ATTORNEY AT LAW—See FRAUD, 58.

BARRIERS.

1. *Lower mine must protect itself.*—It is the business of the owner of the lower mine to protect himself by barriers or otherwise; the duty of leaving barriers is not incumbent upon the owner of the upper mine. *Smith v. Kenrick*, 142

BARRIERS. *Continued.*

2. *Facts of the case.*—Plaintiff was possessed of a colliery, and the defendant of a colliery upon a higher level than that of plaintiff. A previous occupant of defendant's works, with whom defendant was in no wise connected, had worked through and into defendant's barrier of coal, so as to leave them exposed to the accumulation of water, upon the removal of certain coal standing in the defendant's mine; defendant removed this coal in his own mine, whereupon the water escaped into the lower mine, through the wrongful act of the previous occupant of defendant's mine: *Held*, that defendant was not responsible for the injury resulting. *Id.*

3. *Foreign water.*—The owner of the lower mine can only protect himself from the water coming from the upper mine on the dip by leaving barriers; but a failure to leave barriers does not justify the owner of the upper mine in drawing foreign water into it and letting it flow upon the lower mine. *Crompton v. Lea*, 179

See FLOODING.

BILLS AND NOTES—See FRAUD, 37.

BOUNDARIES—See POSSESSION, 1.

CERTIORARI.

1. *Judgment upon certiorari under statute.*—Under the statute, by which a cause was taken to the District Court of Gilpin County from a justice's court by *certiorari*, it is in the power of the court to render an independent judgment, to review and revise the whole case, and give such a judgment as the justice should have given. *Miller v. Sparks*, 232

CLAIM.

1. *A claim is a title.*—Claims located on the public lands are recognized, practically, as titles; recognized by courts as legal estates of freehold, except as to doctrine of abandonment. *Merritt v. Judd*, 62

COLLIERY.

1. *Colliery, a trading concern.*—A colliery is not only an enjoyment of the estate, but, in part, carrying on a trade. *Dudley v. Warde*, 34
See FIXTURES, 1.

CONSIDERATION.

1. *Inadequacy of consideration without fraud.*—Gross misconception of the value of a purchase is not sufficient to set the purchase aside, where the means of ascertaining the value are left open to the vendee, and there has been no deception practiced by the vendor. *Warner v. Daniels*, 436

CONSPIRACY.

1. *Act of one binds all.*—The acts and declarations of one of several conspirators are evidence against all. *Page v. Parker*, 544

2. *Evidence, after conspiracy proved.*—There being evidence that the purchase and sale of land was the combined act of two parties, the publishing of a prospectus, advertisement, etc., by one was evidence against both. *Simons v. Vulcan Oil Co.*, 633

CONSPIRACY. *Continued.*

3. *Acts of conspirators.*—There was evidence that B. & S. acted in concert and made false statements in procuring the subscriptions of M. and others. Evidence of the acts and declarations of B. & S. or either of them, either in the presence or absence of M., if tending to throw light on the transaction or corroborate testimony already in, was admissible. *McCabe v. Burns*, 665
See FRAUD.

CONVEYANCE.

1. *The doing dominates the intent.*—In construing a deed the question is, not what did the grantor intend to do, but what has he done by apt and proper words. *Vanatta v. Brewer*, 358
See ESCROW; FRAUD, 47.

CORPORATION.

1. *Burden of proof* to show the legality of corporate organization, considered. *Warner v. Daniels*, 436
2. *Stockholders can not complain of wrong done the corporation.*—If agents to purchase land for a corporation, transfer it to the corporation for a higher price than they gave, this is a fraud on the company for which it alone can claim redress. *McAlee v. McMurray*, 606
3. *Relation of corporation to its officers.*—The shareholders constitute the company, and the acts of the directors can be inquired into at their instance. A fraud against a corporation by any or all of the directors, may be redressed by an action in the name of the corporation. *Simons v. Vulcan Oil Co.*, 634
4. *Joint action.*—The action being joint, it was necessary to prove that the money had been received by both defendants. *Id.*
See AGENT, 2; FRAUD; PARTIES; PROSPECTUS; STOCK.

CUSTOM.

1. *Custom under Mexican law* was allowed not only to control, limit, modify and interpret the general rules of the system, but even to establish a rule in contravention of the written law; hence, the division of custom without law, custom contrary to law and custom according to law. *Von Schmidt v. Huntington*, 284

DESCRIPTION.

1. *Definite, against vague entry—Extraordinary survey lines.*—A made an entry "running so as to include the rock quarry," a well known site, but the entry was otherwise so vague as to be void for want of description. Afterward B made an entry with definite description, including the quarry. A, with full notice of B's entry, caused a survey to be made a few yards in width and 180 rods in length, so as to reach the quarry, and upon such survey obtained a grant: *Held*, that under these circumstances A is to be looked upon as a junior enterer with notice of a prior entry by B; that the title of B was preferable, and that A should be decreed to make conveyance and to account. *Allen v. Gilreath*, 470
2. *Description in preliminary contract.*—Defendant, by contract in writing, agreed with plaintiff to take a lease of "those two seams of coal

DESCRIPTION. *Continued.*

- known as the two feet coal, and the three feet coal, lying under lands to be hereafter defined, in the Bank End estate": *Held*, that the contract was sufficiently definite to be enforced, and that its true construction was that the bounds, not of the seams, but of the estate, were to be in the lease. *Haywood v. Cope*, 499
See FORCIBLE ENTRY. 2.

DISTRICT RULES.

1. *Query, as to retroactive district rules.*—The mode of acquiring, and the extent of a claim, may be settled by district rules, but *query*—to what extent can the adoption of new rules, or the abrogation of old ones, affect title once acquired? *Dutch Flat Co. v. Mooney*, 303

DITCH—See FLUME.

EASEMENT—See LICENSE.

EJECTMENT.

1. *Former recovery in ejectment.*—A recovery in ejectment (at common law) is no bar to a subsequent recovery by either party. *Doe v. Banks*, 273
2. *Ejectment by ousted lessee.*—A lessee, out of possession, can not recover in ejectment without showing performance or an offer to perform his covenants. *Kreutz v. McKnight*, 314

ERROR.

1. *Where no case, rulings immaterial.*—Where there is no cause of action it is not material whether rulings adverse to the plaintiff were or were not correct. *Bewick v. Fletcher*, 117
2. *Error, in charge upon one of several defenses.*—When several defenses have been pleaded and the court has erred in its instructions upon one of them, the court above not being able to say that the verdict was based upon the other defenses alone, will reverse for the error. *Wiseman v. McNulty*, 326

ESCROW.

1. *Custodian of escrow papers.*—The custodian of a deed in escrow refusing to deliver the same to any person, or threatening to deliver it to an adverse person, is a proper party to a bill in equity, for either specific performance or rescission. *Davis v. Henry*, 680

EVIDENCE.

1. *Unexecuted paper not evidence.*—A draft lease was prepared by the lessor in pursuance of the within contract, which was not objected to by the lessee who afterward refused to complete: *Held*, that the draft lease could not be used for the purpose of controlling or explaining the contract itself. *Haywood v. Cope*, 499
2. *Meaning of general expressions.*—General expressions go to the jury to be interpreted according to the circumstances and other conversation between the same parties. *Bradley v. Poole*, 581
3. *Presumption of fact from fact.*—One fact can not be presumed from another fact which is itself but an inference. *McAleer v. McMurray*, 607

EVIDENCE. Continued.

4. *Practice, where erroneous testimony is admitted by mistake.*—The refusal to strike out the evidence of a witness afterward ascertained to be interested, is not assignable for error. It is to be corrected by a request to charge that the evidence be disregarded. *Simons v. Vulcan Oil Co.*, 633

5. *Testimony has no venue.*—Declarations of the parties, if relevant, are admissible, no matter where made. *Id.*

See CORPORATION, 1; FAULT, 3; FORFEITURE, 13; FRAUD, 52; PARTNERSHIP, 3.

EXECUTION.

1. *Execution inoperative against parties not served.*—A constable's deed selling the mining claims of a company who held the ground as tenants in common does not convey the title of the individuals who were not served with process and never appeared. *Wiseman v. McNulty*, 326
See FORCIBLE ENTRY, 6, 18; SHERIFF'S DEED.

EXPERT.

1. *Testimony of experts analyzed.*—An expert knows that he can not be indicted for perjury because his testimony is matter of opinion; he is employed in the sense of gain by the person who calls him, and he is selected according as his opinion is known to incline. *Abinger v. Ash-ton*, 1

FAULT.

1. *Lessee can not hold lease and refuse to work—Accident from fault.*—In covenant on a coal lease for rent payable unless defendant was prevented by unavoidable accident from working the pit, the defendant pleaded such accident, to wit: The penetration of water through faults. The proof showed that the working might have proceeded, though at great expense, and the defendant refused to surrender his lease: *Held* (in view of the refusal to surrender), that plaintiff was entitled to recover. "Unavoidable accident" considered. *Morris v. Smith*, 22

2. *Fault, affecting specific performance.*—Where a fault was supposed to run in a certain direction, so as to cut a piece of land into two tracts of about eighty-three acres and about ninety-eight acres respectively, but it was afterward so developed as to show that only about eight acres were on one side and the balance on the other: *Held*, that it was such a misconception of the truth that, although the two tracts had been bargained for with the knowledge that there was some uncertainty as to quantity, no specific performance should be decreed of a contract to lease the parcel found to contain so many acres of excess. *Davis v. Shepherd*, 24

3. *The burden of proof* lies upon the party seeking specific performance, to prove such fault so as to leave no reasonable doubt as to its location. *Id.*

FIXTURES.

1. *Colliery engines go to the tenant.*—Tenant for life, or in tail, erects a fire engine to work a colliery. It shall, on his death, be considered as part of his personal estate, and not go with the real estate to the remainder man. *Dudley v. Warde*, 34

FIXTURES. *Continued.*

2. *Trade fixtures removable.*—What is annexed to the freehold is to be considered as part of it. But, between landlord and tenant, the latter may, during the term, remove what he erects for trade. *Id.*

3. *Buildings accessory to engines.*—Where engines, etc., are the principal, and the house only accessory, they may be removed, though the house be thereby injured. *Id.*

4. *Salt pans.*—Plaintiff demised salt springs to defendant, who was to erect salt works on the premises, and pay a rent in proportion to the number of works erected. Defendant covenanted to leave the works in good repair at the end of the term: *Held*, that iron salt pans, placed by defendant on a frame of brick and used in the boiling of salt, were parcel of such works, and that defendant was not entitled to remove them. *Mansfield v. Blackburne*, 36

5. *Distinction between trade and other fixtures.*—The criterion of a fixture in a mansion house or dwelling is actual and permanent fastening to the freehold, but this is not the criterion of a fixture in a manufactory or a mill. *Voorhis v. Freeman*, 49

6. *Machinery temporarily detached.*—Different rule applied to vendors and lessors.—Machinery which is a constituent part of the manufactory to which the building has been adapted, without which it would cease to be such manufactory, is part of the freehold though not actually fastened to it; and this criterion has a place in questions between vendor and vendee, heir and executor, as well as debtor and execution creditor; but not between tenant and landlord or remainder man. *Ruled*, therefore, that a mortgage and sale of a lot and rolling-mill with the buildings, apparatus, steam engine, boilers and bellows attached to the same, passed the entire set of rolls used in the mill, whether actually in place or temporarily detached, and that such rolls could not be seized as chattels on execution against the mortgagor. *Id.*

7. *Apparatus.*—Without the application of this rule the word *apparatus* used in the conveyance would have been sufficient to bring the same result. *Id.*

8. *Steam engine and boilers.*—A steam engine and boilers fixed in an anthracite furnace for the manufacture of iron are part of the realty. *Roberts v. Dauphin Bank*, 54

9. *Fixture defined.*—Various definitions of "a fixture" reviewed. It is agreed to be "an article of a personal nature affixed to the freehold." *Merritt v. Judd*, 62

10. *Pump, boiler and engine are removable trade fixtures.*—A steam engine, boiler and pump, bedded into the ledge sufficiently to get a level, covered by a shed for shelter, and used in working a mine, are fixtures, of that class known as trade fixtures, removable by the tenant during term, or so long as he holds under a right still to consider himself a tenant. *Id.*

11. *Right of removal subject to special contract.*—The right of removal is subject to the agreement of the parties, or may be controlled by local usage. *Id.*

12. *Improvements.*—Such machinery as above described is included by the term improvement. *Id.*

FIXTURES. *Continued.*

13. *Subsequent contract, without merger.*—When the lease stipulated that the improvements were to go to the lessor on forfeiture, the lessor's right is not lessened by his giving a title bond for the conveyance of the fixtures, with the terms or payments of which the lessee failed to comply. *Id.*

14. *Renewal.*—The renewal of a lease destroys the lessee's right to remove fixtures. *Id.*

15. *Law of fixtures affected by the relation of the parties.*—A deed or mortgage carries fixtures as parcel of the freehold where, as between lessor and lessee, the lessee would be entitled to remove them. *Id.*

16. *Title bond.*—A title bond is in effect a mortgage; the legal title remains in the vendor with an equity in the vendee to have the title to the whole estate, including fixtures, on compliance with the conditions. *Id.*

17. *Tramways.*—Coal and iron works were demised along with mines, with liberty to lessees to make "roads and ways." The lessees covenanted *inter alia* to uphold and keep in good repair the "works" and at end of term to deliver up the property and "all ways and roads in, upon or under" the same, in such good order that the works might be continued by the lessor: *Held*, that this covenant did not extend to trams fastened to sleepers not affixed to the freehold, which the tenant had placed upon roads for the purpose of treating them as tramways, and that therefore the landlord was not entitled to an injunction to restrain the tenant from disposing of them during the term. *Beaufort v. Bates*, 75

18. *Works, roads and ways.*—Neither of the terms, works, roads or ways, covers a temporary tramway not affixed to the freehold. *Id.*

19. *Fixtures defined.*—A fixture may be defined as anything by artificial means attached permanently or substantially to the soil or freehold. More technically it is something substantially affixed to the land, but which may afterward be lawfully removed therefrom by the party affixing it, without the consent of the owner of the freehold. *Prescott v. Wells*, 89

20. *Amalgamating machinery* furnished to a mill owner upon his agreement to pay rent therefor and attached to the realty considered as within the latter definition of fixtures. *Id.*

21. *Sale of tramway by creditor of lessee.*—Plaintiff and defendants leased adjoining coal lands to the same lessees; a tunnel was made through plaintiff's land to reach defendants', on which was the outlet of the slope; rails were laid by lessees on the track in the tunnel. Their leasehold interest in the defendants' land was levied on, with the appurtenances, consisting of a breaker, etc., "and railroads in and about and connected with said mines." The rails had been removed from the track, and plaintiff claimed that they had been delivered to him for rent. In an action of trover for them, *held*, that whether the rails were included in the levy was properly submitted to the jury. *Hefner v. Lewis*, 98

22. *Machinery during term of lease.*—Machinery erected by a lessee to carry on his business is personal property during his term; it may be sold on execution, and the purchaser may remove it before the expiration of the term. *Id.*

23. *Hoisting machinery belongs to lessee.*—A steam engine, machinery and fixtures attached to the soil by a lessee thereof, for the purpose of

FIXTURES. *Continued.*

hoisting coal from mines, including all boxes and necessary appurtenances, remain a part of the lessee's estate. *Dobschuetz v. Holliday*, 108

24. *Facts of the case—Machinery placed by purchaser under executory contract.*—Vendee made contract to purchase mines, to receive title on payment of purchase money. He entered and put up machinery (engine, boilers, etc., affixed to the soil). He made default in payment of purchase money. Afterward the vendor became bankrupt, and his estate was sold. *Held*, that this machinery passed to the assignee of the vendor. *Moore v. Valentine*, 112

25. *Vendee can not remove fixtures on default.*—An unconditional contract to purchase creates the relation of vendor and vendee, and such vendee making default is not entitled to remove additions to the land; otherwise, if he had made a conditional contract of purchase. *Id.*

26. *Derrick not a fixture.*—Machinery was put up in a drill house on another's land for the temporary purpose of boring a salt well, and was removable without injuring the freehold. *Held*, that it was not a fixture and was not covered by a conveyance of the land. *Bewick v. Fletcher*, 117

27. *Terms, imposed on removal, without consideration.*—Where machinery has not become a fixture the purchaser of the land can not impose terms on its removal by its owner, and if the latter agrees to terms without a consideration he is not bound by them or estopped from claiming title and possession. *Id.*

28. *Removal of mining improvements by miner under mining customs of the King's Field.*—Before the time of legal memory the customs of the King's Field existed, and, established by statute, exist to this day. Under them the lands were free to all persons to search for and work mines of lead, paying certain royalties. And as to their improvements, the miners have rights analogous to the right of an owner in fee to enter and remove buildings, when he has sold land excepting the buildings. *Wake v. Hall*, 119

29. *Idem.*—A miner who has erected buildings, reasonably necessary for working his mine, is entitled, as against the surface owner, to pull down and remove the same at any time while he continues to work, or within a reasonable time after he has ceased to work; but he is not entitled to remove them after he has allowed such reasonable time to expire. *Id.*

See MORTGAGE, 1, 2; PLEADING AND PRACTICE, 2.

FLOODING.

1. *Owner liable for action of water brought on his land.*—Where the owner of land without willfulness or negligence uses his land in the ordinary manner of its use, though injury should thereby be occasioned to his neighbor he will not be liable in damages. But if he bring upon his land anything which would not naturally come upon it and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal willfulness or negligence, he will be liable in damages for any mischief thereby occasioned. *Rylands v. Fletcher*, 129

FLOODING. *Continued.*

2. *Application of the rule—Reservoir tapped—Mine drowned.*—A was the lessee of mines. B was the owner of a mill standing on land adjoining that under which the mines were worked. B desired to construct a reservoir and employed competent persons for that purpose. A had worked his mines up to a spot where were certain old passages of disused mines; these passages were connected with vertical shafts which communicated with the land above, and were apparently choked with marl and earth. No care was taken in building the reservoir to block these shafts, and shortly after water had been introduced into the reservoir it broke through some of these shafts, flowed through the old passages and flooded A's mine: *Held*, that B was liable to A for the damage so caused: *Id.*

3. *Upper mine may be worked to boundary.*—The owner of the mine on the higher level has a right to work the whole of his mine in the usual and proper manner so as to get out all the coal; and he is not liable to the owner of the lower mine for the flow of water from works so conducted. *Smith v. Kenrick*, 142

4. *Prior appropriation of lower, prevents flooding by upper claims.*—Plaintiffs owned some claims in the bed of a creek. Defendants owned claims on a hillside above the gulch locations, and in working, covered plaintiffs' claims with tailings, preventing work and destroying their value. Plaintiffs' claims were first located: *Held*, that the rule *qui prior est in tempore potior est in jure* controlled the case, and that defendants were rightfully enjoined from further flooding. *Logan v. Driscoll*, 172

5. *Sic utere tuo.*—Because defendants' use of their claims may not be unlawful is no reason to excuse the effect of such use upon the rights of others. It does not prevent the application of the maxim *sic utere tuo ut alienum non lædas*. *Id.*

6. *Injunction to restrain flooding, with accounting and allowance of expenses.*—The proprietors of a coal mine had so worked their mine by opening cuttings to draw off the water therein that they had caused the adjoining mine of the plaintiffs to be flooded, and from such openings the defendants had also abstracted coal from their neighbor's mine, and sold the same for their own benefit. An injunction was granted to restrain the defendants from further proceeding; to stop up the existing openings; from making another further opening which would have the effect complained of; and for compensation to the full market value of the coal, with allowance of the cost of searching out the holes which had caused the flooding. *Plant v. Stott*, 175

7. *Flooding mine by tapping river bed, enjoined.*—A bill averred that a mine which the defendant threatened to work could not be worked without letting in a river and flooding defendant's mine, and through that, the plaintiff's mine, which lay on the dip of the coal seam below the defendant's mine, and prayed an injunction. Demurrer to bill overruled, and case distinguished from the ordinary instance of the lower mine having no protection from water produced in the upper mine as the result of working in ordinary cases. *Crompton v. Lea*, 179

8. *Upper and lower mines on same dip.*—Each coal mine on the d p

FLOODING. *Continued.*

is entitled to the whole of its coal, leaving the water to take its own course; but this does not allow the owner of the upper mine to draw foreign water into it from a river, and let it down on the lower mine. *Id.*

9. *Lower mine flooded by bursting of artificial channel, diverting watercourse.*—Defendants' mine adjoined and communicated with the plaintiff's, and on the surface of defendants' land were certain pits made by them. Across this surface ran a watercourse which had been diverted by them into a new channel. The banks of this new channel burst, as the result of an exceptionally heavy downfall of rain, gathered into the pits and thence drained into plaintiff's mine. Defendant was guilty of no actual negligence. If the pits had not existed the water would not have penetrated plaintiff's works: *Held*, that the case was distinguishable from *Rylands v. Fletcher*. That negligence was not essential to render defendant liable; that the water coming from the natural overflow, and that coming from the diversion of the watercourse, might admit of different considerations, and that it was material to be found as a fact whether what was done by the defendants was done in the ordinary and proper working of the mine. *Smith v. Fletcher*, 192

10. *Statute of Limitations, where flooding ultimately results from original trespass.*—Defendant, lessee of a coal mine, worked across boundary into the land of an adjoining proprietor, in 1861. In 1862 he quit work and surrendered the lease. The plaintiff purchased the adjoining land so trespassed upon, in 1864, worked it for coal, and, in 1863, tapped the water in defendant's abandoned workings where defendant had crossed the line. This necessitated pumping. Plaintiff commenced action for the cost of drainage in 1873: *Held*, that the Statute of Limitations began to run from date of the original trespass, and that the action was therefore barred. *Williams v. Pomeroy Coal Co.*, 195
See BARRIERS.

FLUME.

1. *Appropriation pending construction of flume.*—Parties having the prior right to the waters of a stream by the commencement and partial completion of a ditch and flume have the right to use so much as is necessary to preserve their flume from injury while in process of construction. *Weaver v. Conger*, 203

FORCIBLE ENTRY.

1. *Statutory elements of forcible entry and detainer.*—The statute provides for two classes of cases: 1. An unlawful and forcible entry and detainer. 2. A lawful and peaceable entry with an unlawful detainer. The complaint must state one of these two causes. A complaint alleging a forcible detainer without alleging a forcible entry is bad. *Cox v. Groshong*, 210

2. *Description.*—The complaint must describe the premises with reasonable certainty. A description of the land as "a certain range of lead ore and a strip of land, or piece on each side thereof twenty-five yards on each side running easterly and westerly" etc., is bad for uncertainty. *Id.*

FORCIBLE ENTRY. *Continued.*

3. *Practice—Waiver of defects.*—Proceeding to trial is no waiver of defects in complaint. *Id.*

4. *Strict construction.*—In forcible entry and detainer proceedings the provisions of the statute are to be strictly pursued. *Id.*

5. *Forcible entry by rightful owner.*—When one having title and right of entry enters the land by force, the party dispossessed has no sure remedy at common law, but must resort to the statutory remedy by action of forcible entry. *Fuhr v. Dean,* 216

6. *Writ of possession against acquitted defendants.*—Plaintiff sued A. B and C for forcible entry of a mine; the verdict was guilty as to A and B, not guilty as to C: *Held*, that such verdict was conclusive of the fact that plaintiff was rightfully in possession and had been wrongfully dispossessed by certain parties; that as to C, it merely showed that he did not participate in the trespass, and that the writ justified the dispossession of all the defendants. *Fremont v. Crippen,* 221

7. *Mandamus to compel sheriff to execute writ.*—In such a case a peremptory mandamus will issue to compel the execution of the writ against parties claiming under the acquitted defendant. *Id.*

8. *Title in controversy.*—It is doubtful whether in a pure action of forcible entry and detainer the title can be involved; but if it may be, and the cause arise before a justice of the peace, the statute allowing removal to the district court of cases raising questions of title, becomes applicable. *Henderson v. Allen,* 227

9. *Pleading in justices' courts.*—An answer denying generally the allegations of a complaint is sufficient in an action before a justice of the peace. *Id.*

10. *Prospecting contract does not create relation of landlord and tenant.*—An agreement by which a party agrees with the claimant of public land to prospect it for coal, the coal when found to be worked on shares, constitutes the parties to the contract tenants in common or mining partners and does not constitute the relation of landlord and tenant. The action of unlawful detainer will not, therefore, lie against the prospecting party. *Id.*

11. *Possession essential to recovery—Mine remaining unworked.*—A party who has worked a mining claim, run tunnels and sunk shafts for prospecting purposes, but who has quit work and done nothing for some months except to leave his tools on the premises, and has never marked his boundaries—has not such possession as is essential to maintain forcible entry. *Laird v. Waterford,* 230

12. *Entry on such claim by second prospector.*—And a second party peaceably entering upon such premises is not guilty of a forcible entry, nor does his refusal to yield possession on demand make him guilty of a forcible detainer. *Id.*

13. *Lessor's right of re-entry—Demand of rent.*—A lessor of a mine before he exercises the right of re-entry reserved for breach of covenant to pay rent, must make an actual demand of the amount of rent due, in strict compliance with the requirements of the common law. *Miller v. Sparks,* 231

FORCIBLE ENTRY. *Continued.*

14. *Necessary averments implied from record.*—In an action of forcible entry and detainer, it is necessary that the complaint should show that the defendant entered upon the possession of the plaintiff; but that which appears by necessary implication from the record is the same as if expressly averred. *Id.*

15. *Sufficiency of complaint.*—A complaint which alleges a forcible detainer, and also alleges a demand for possession when no such demand was necessary, does not, therefore, state two causes of action in the same count. *Id.*

16. *Title not at issue in this action.*—In an action under the Forcible Entry and Detainer Act, the defendant is not allowed to show title in himself nor to disprove that of the plaintiff. The action does not supersede that of ejectment. *Bourdmán v. Thompson*, 240

17. *The California precedents* are under a different statute and are inapplicable to Montana. *Id.*

18. *Writ of assistance—Entry during absence of party.*—An entry is not given by law until there has been an adjudication of the right; in such case a writ of assistance will issue; but until then a party entering in the temporary absence of another, is guilty of a forcible entry under the statute. *Id.*

19. *Limitation Act.*—Quiet possession by defendant for one year bars the action; until such period has elapsed, the court will not presume acquiescence from mere silence. *Id.*

FORFEITURE.

1. *Colorable forfeiture.*—The declaration of a forfeiture without cause of forfeiture proved, amounts (as against third parties) to no more than a voluntary surrender. *Dobschuetz v. Holliday*, 108

2. *Territory can not take forfeiture.*—A territory can not declare or enforce to itself a forfeiture of mining claims on the public domain, located, purchased or held by an alien. The statute of Montana attempting such result is void. *Territory v. Lee*, 248

3. *Forfeiture at option of lessor.*—A lease of coal mines provided that the lease should be void to all intents and purposes if the tenant should cease working at any time, two years. After the working had ceased more than two years, the lessor received rent: *Held*, that a tenancy from year to year was not thereby created, for the lease was not absolutely void by the cesser to work, but voidable at the option of the lessor; and that he might avoid the lease for any subsequent cesser of work amounting to two years, after the period for which rent was received. *Doe v. Bancks*, 278

4. *Party can not plead his own wrong.*—A party can not plead his own broken covenants as effecting a forfeiture to his advantage. *Id.*

5. *Condonation of one forfeiture* does not prevent a landlord from asserting his right upon a subsequent cause of forfeiture occurring, unless through his failure, lessee has been induced to make expenditures. *Id.*

6. *Forfeiture not favored.*—Contracts as well as statutes providing for forfeiture must receive a strict construction, and the facts to support the forfeiture must be clear and not left to inference or argument. *Von Schmidt v. Huntington*, 284

FORFEITURE. *Continued.*

7. *Forfeiture for desertion.*—The articles provided for forfeiture of shares for desertion and for absence without leave. Upon the facts stated in the opinion the court held the shares, both money and labor, of parties who had not only left but tried to break up the company, to be rightfully forfeited; “desertion” and “absence without leave” distinguished. *Id.*

8. *Pleading forfeiture under district rule.*—An answer in ejectment averring that whatever right plaintiffs may have had was forfeited by non-compliance with the rules of the diggings is insufficient in not setting forth the rules specifically. *Dutch Flat Co. v. Mooney*, 303

9. *Forfeiture, a legal conclusion.*—The averment of forfeiture is the averment of a legal conclusion upon which no issue can be taken; the facts upon which the forfeiture was based should be stated. *Id.*

10. *Condition distinguished from covenant.*—A coal lease contained a provision that the lessee should do no injury to the surface nor spoil the coal itself, the lessor reserving the right to send an expert into the mine to see in what manner the business was therein done: *Held*, not a condition for breach of which lessors might enter, but a covenant for breach of which lessee was liable in damages. *McKnight v. Kreutz*, 305

11. *Forfeiture not favored.*—Conditions that work forfeitures are not favorites of the law, and to make a provision such, it must be manifested by a clear expression of intention. *Id.*

12. *Expressio unius, exclusio alterius.*—Where, in a lease, causes of forfeiture are specified, it is not to be inferred that there are other grounds of forfeiture, not declared to be such. *Id.*

13. *Burden of proof.*—In ejectment by lessee against lessors who have entered for breach of condition, the burden of proof is upon the lessors to prove the forfeiture. *Id.*

14. *Entry presumed to be for breach, where breach existed.*—The lessee agreed to mine 72,000 bushels each year, to pay a stipulated sum for each 100 bushels and to make monthly returns; if he neglected to comply with the covenants for payment, lessors might determine the lease. The lessee failed in these payments, and the lessors resumed possession. *Held*, that the possession must be presumed to have been in virtue of their right to take possession in the absence of proof to the contrary, and that the court erred in submitting the question of waiver of plaintiff's right to the jury. *Id.*

15. *Delay, held no waiver of forfeiture.*—The court below charged that “If the lessee did not pay for all the coal actually taken out, * * and if the lessors let it stand over without saying or doing anything to enforce a compliance or notice of an intention to do so for more than two years, the lessee might conclude that they did not intend to insist on a forfeiture, and, if so, their remedy would be against him personally for rent in arrear.” *Held*, that the exception thereto should have been sustained (without specification of the particular error). *Id.*

16. *Laches of ousted tenant.*—A coal lease provided that in default of payment of monthly rents lessors should have full power to dissolve the lease. After working several months, mostly in fixing and cleaning out

FORFEITURE. *Continued.*

the mine, which was an old one, making partial payments of rent, but without the monthly returns, which were not demanded, he was ousted at night by breaking the lock, and the entry, in this manner, by one of the defendants under another lease. He delayed bringing suit for over two years: *Held*, that this was "not the way" to enforce the forfeiture; but that the delay in bringing suit was fatal to plaintiff's recovery. *Kreutz v. McKnight*, 314

17. *Forfeiture of lease by neglect to operate.*—By lease for 999 years, premises were let under covenant to take therefrom, from year to year, such quantities of ore as should be considered as improving the same in a good husband-like and thorough manner, and to pay royalty, with forfeiture for breach of either covenant: *Held*, that failure to work for sixteen months, during which period it would have been profitable to work the ore bed, was a breach of condition, for which lessor or his assignee might reenter and declare forfeiture. *Stockbridge Co. v. Cone Iron Works*, 317

18. *Forfeiture not effected without entry—Facts showing entry.*—There must be an entry or possession, with intent to hold the property for forfeiture. Lessees had abandoned the premises; plaintiffs had occupied the surface, cutting off lessees' access to the ore, and had let a portion of the mine to a third party, and had notified sundry parties that they had entered for breach of condition: *Held*, that these facts authorized the finding that lessor had entered and determined the lease. *Id.*

19. *Forfeiture for default on assessments—Strict construction.*—Where tenants in common entered into contract to develop their claims by running a tunnel, each party to be assessed once in four weeks, and for neglect to pay assessments the shares of those in default were to be forfeited to the company: *Held*, that if such forfeiture could be enforced the rule of strict literal construction should be applied. That the assessments must be levied once in four weeks and not at other times. That the "company" would not be considered to mean the remaining members. *Wiseman v. McNulty*, 326

20. *Idem—Contract to forfeit, invalid—Abandonment distinguished.*—It seems such contract is not a recognizable mode of transferring title, which would be the result if enforced; it can be distinguished from a contract providing that on failure to perform certain conditions the claim should be deemed abandoned. *Id.*

21. *Strict performance required of party claiming forfeit.*—Parties claiming forfeit for breach of condition must show a strict performance on their part of all conditions required of them. *Id.*

22. *Necessary parties.*—To allow of forfeiture there must be a person in being, competent to take, at the time the forfeiture accrues. *Id.*

23. *Premature call of meeting to assess stock.*—The articles of a joint stock association provided for an assessment to be levied upon its assessable shares, upon condition, *inter alia*, that the proceeds of the sales of certain 200 other shares should first have been expended. A notice was given for a meeting to be held for the purpose of making an assessment before all of these 200 shares had been sold: *Held*, that the notice was

FORFEITURE. *Continued.*

premature; that no valid meeting under such notice for such purpose could be held, although all of the 200 shares were sold between the date of the call and the date when the meeting was held; and that a forfeiture resulting from an assessment at such meeting was void. *Westcott v. Minnesota Co.*, 336

24. *Verbal notice of meeting.*—Where the articles of association provided for a written or printed notification of meetings, a verbal notice is not sufficient to bind shareholders who did not waive notice by appearing. *Id.*

25. *Conditions precedent to forfeiture.*—The right to forfeit shares in any joint stock undertaking must come from the law, and can only be exercised in the manner prescribed by law. In this case the articles of association are the law governing the right of forfeiture, and all the conditions precedent which are made by them must be strictly complied with or the attempted forfeiture is void. *Id.*

26. *Covenant for working china clay—Re-entry upon breach.*—A mining lease contained a covenant, on the part of the lessees, to "during the said term, work the said limits for china clay and china stone in the most proper and effective manner, and with a reasonable number of able-bodied men and assistants kept employed on the said works, at all reasonable and usual working times, and so that the china clay and china stone to be there found may be raised, washed, and made merchantable as speedily as practicable." And there was a proviso for re-entry and revocation of the lease upon breach of the covenants, or non-payment of the dead rent and royalties. *Held*, that the lessees in omitting to "raise" the china clay, had been guilty of a breach of the covenant, even if they had in other respects conformed with the provisions of the covenant, and that in an action by the lessors, the court of chancery would not grant an interlocutory injunction to restrain the lessor, who had re-entered and taken possession of the land and works, from continuing in such possession until the trial of the action. *Kinsman v Jackson*, 352

27. *Breach does not operate forfeiture.*—A breach of the covenants of a lease, in the absence of a stipulation to that effect, does not work a forfeiture of the term. *Vanatta v. Brewer*, 358

28. *Where a term is demised in clear and apt words*, it can be defeated only by words as strong and express as those by which it is created. *Id.*

29. *Covenant distinguished from condition and limitation—Facts of the case—Injunction.*—Upon motion to dissolve an injunction restraining the defendants from sinking a shaft, it appeared that the defendants were assignees of a lease of the premises which contained a clause that the lessees should commence a search for minerals within two months from the date of the lease and should have twelve months from such date to explore the land for ores or minerals: *Held*, that the clause was neither a limitation upon the term granted, nor a condition upon breach of which the term should end, but was a simple covenant, which in the absence of a stipulation that a breach should work a forfeiture, would not have that effect; and that the injunction must be dissolved. *Id.*

See LEASE, 3.

FRAUD.

1. *Suppressio veri, as to salines*.—A party having discovered salt water on the land, by artifice prevented knowledge of the fact reaching the vendor until he had been able to consummate the purchase. *Held*, that the purchase must be set aside. *Bowman v. Bates*, 363

2. *Coal vein in river bed—Judicial cognizance of the practicability of mining*.—Defendant, by representations in strong, if not overdrawn language, induced Fulton to purchase a coal mine for a sum stated, and an annuity of \$1,000 for 20 years—unless, after the mine had been faithfully worked, it should not produce a certain amount—and under the contract a certain tract was conveyed. The coal bank, in fact, cropped out between high and low water mark on the Ohio river, on the borders of the tract conveyed. From that fact the court concluded that any attempted working of the mine was necessarily useless and unprofitable, and the contract to be founded on mistake or misrepresentation, and the defendant was enjoined from any attempt to collect the annuity. *Dale v. Roosevelt*, 369

3. *Sale of coal vein in river bed—Relief from exploitation*.—Fulton purchased of Roosevelt a tract of land on the bank of the Ohio river, the vendor representing and believing that it contained a valuable coal mine, and besides an obligation to pay \$1,400. the vendee covenanted to pay an annuity of \$1,000 for twenty years, unless after the mine was faithfully worked by the purchaser it should not yield a certain quantity of coal. It appeared that there was no mine of any such value, accessibility or productiveness as alleged by the vendor: *Held*, that as there was *no such mine as represented*, the purchaser was not bound to work it to determine whether it should yield the prescribed quantity, and that the vendor should be perpetually enjoined from prosecuting at law for the annuity. *Roosevelt v. Dale*, 377

4. *Relief based on representations false but not fraudulent*.—Relief may be granted in equity against any deed or contract founded on representations found not to be true, although the representations were based on misapprehension of facts and were not fraudulently made—on the ground of mistake. *Id.*

5. *Collusion between trustee and purchaser*.—Confirmation of sale set aside upon showing of arrangement by purchaser to take in one of the trustees making sale, as a partner. *Bailey v. Watkins*, 387

6. *Relief in equity against directors*.—The shareholders in a joint stock company are entitled to relief in equity where the conduct of the directors has been fraudulent or amounts to a violation of the terms on which the company was formed. *Blain v. Agar*, 388

7. *Necessary parties*.—If several of the shareholders assign by deed their deposits to others and appoint the latter their attorneys, for recovering their deposits, the assignees can not sue on behalf of themselves and their assignors, but the latter, however numerous, must be made parties. *Id.*

8. *In cases of fraud courts of equity have concurrent jurisdiction with courts of law*. *Blain v. Agar*, 393

9. *Status of original shareholders*.—The holders of shares in a joint

FRAUD. Continued.

stock company, purchased immediately from the company, are entitled to relief in equity against the fraudulent conduct of the directors. *Id.*

10. *Unknown shareholders.*—Some of the shareholders in a joint stock company may file a bill to have their deposits repaid without making all the other shareholders parties, if they are ignorant of their names. *Id.*

11. *Condonation.*—If a party be induced to purchase an article by fraudulent misrepresentations of the seller respecting it, and after discovering the fraud continue to deal with the article as his own, he can not recover back the money from the seller. *Campbell v. Fleming*, 395

12. *Discovery of further fraud.*—A right to repudiate so lost is not revived by the subsequent discovery of another incident in the same fraud. *Id.*

13. *Discovery of gold concealed by intervening purchaser.*—While the vendee was in possession, a valuable gold mine was discovered on the premises. A third party went to the vendor, from whom they concealed the discovery of gold, and also misrepresented the willingness of vendee to take the land, and the obligation upon vendor to convey: *Held*, that an equity might exist against such third party, independent of the obligation of the vendor to make conveyance. *Falls v. Carpenter*, 397

14. *Representations as to thickness of coal beds.*—To bill for specific performance of agreement to take a lease of coal mines, defendant answered misrepresentations as to the depth and thickness of the beds, which are matters that are known to vary. The court made an issue to the jury whether any false representations were made, and whether if made they were relied on by the defendant, and the issue being found for plaintiff, the court refused to disturb the finding. *Clapham v. Shillito*, 431

15. *Rule to determine whether party has acted on the false representations made.*—The relative knowledge of the parties is to be considered, and if the party to whom the representations were made resorted to the proper means of verification before he made the contract, it may appear that he relied upon his own investigations and not upon the representations made to him; or the circumstances may be such as to charge him with such knowledge as upon due inquiry was obtainable and such as to exclude the notion that he relied on the representations made to him. *Id.*

16. *Matters of inference or opinion.*—Misrepresentations are to be considered with reference to the subject-matter, which may be uncertain, and all knowledge of it only inference of an uncertain nature. *Id.*

17. *Matters preventing equitable relief.*—Where the facts justify equitable relief, the only matters barring such relief are, 1, great and unexplained delay in seeking it; 2, the existence of adequate relief at law; or, 3, such a position of the property in controversy as to render it impracticable to grant redress. *Warner v. Daniels*, 436

18. *False representations based on mistake.*—Representations both material and false will vitiate a contract, although a fraudulent intent be wanting, as in case of representations made on mistaken belief. *Id.*

19. *Composition metal sold for copper.*—A sold to B a quantity of

FRAUD. *Continued.*

metal as copper, which A knew to be not copper but a composition metal. A is liable for the deceit in concealing his knowledge from B, who purchased on the representations of A, and was thereby deceived. *Cornelius v. Molloy*, 456

20. *Inspection, where defect is latent.*—The fact that an article sold was inspected by the purchaser will not avoid the liability of the vendor when it is a different thing from that which the purchaser intended to buy, and its true character could not be ascertained by mere inspection. *Id.*

21. *Concealment of knowledge* that the article sold was not in fact what it appeared to be, or of such circumstances as would induce a purchaser to test the article before buying, is an undue concealment, for which the seller is liable in case for the deceit. (Per KENNEDY and BELL, JJ.) *Id.*

22. *Collusion with lessee to forfeit and renew*—Lands were subject to a lease of way-leave—the privilege of carrying the product of certain collieries across them, which lease it was in the power of the lessee to surrender on notice. While it was outstanding for a long term, the land and the rental of this lease were sold to separate parties. After some time the owner of the land and the lessees entered into an arrangement to put an end to the lease and accept a new one: *Held*, that this was contrary to equity, and that the purchase of the rental of the old lease should be compensated in full out of the rental reserved in the new one. *Wood v. Marquis of Londonderry*, 464

23. *Location of claim after negotiations conceding title to it.*—Before the entry of B he had agreed to purchase from A a tract of land, *A reserving the rock quarry*; but the rock quarry did not, in fact, exist on any part of the tract: *Held*, that this formed no reason in equity why A should not enter the rock quarry when he found it vacant. *Allen v. Gilreath*, 471

24. *Mere praise of property is no fraud.*—Mere statements of the great value of premises as gold property are not fraudulent representations. *McDowell v. Simms*, 476

25. *By-bidder—No laches allowed in favor of rescission.*—Conceding the employment of a by-bidder at an auction sale to be a fraud, yet the vendee can not set it up as ground of rescission unless he abandon forthwith; he can not first prospect the property and then come in to set the sale aside. *Id.*

26. *Secret payment by vendor to one of the purchasers—Breach of trust—Mine worth the full price.*—Four out of five persons who entered into a provisional contract to purchase a mine, which they agreed to sell for their joint benefit to a company, were deceived by the fifth, who, assuring them that the vendors would not take less than £85,714, obtained secretly from the latter an agreement that if the contract were perfected, and money paid, he should receive thereout a bonus of £20,000 for his pains in effecting the sale. Two of the four having absolute powers from the rest to sell to the intended company, then formed themselves with others into a committee of management, and still ignorant of the surreptitious agreement issued a prospectus, stating that a contract had been

FRAUD. *Continued.*

entered into for the purchase by the company of the entire property for £125,000, "including all preliminary expenses and a premium to the parties who incurred the risk and responsibility of the original purchase." The company having been established, the requisite capital paid up and the provisional contract perfected: *Held*, that the £20,000 transaction was fraudulent and void, not only as against the four original purchasers, but also as against the company, notwithstanding the mine proved cheap at the price (£125,000) at which they became shareholders. It was not enough that the company got the whole of their bargain. They had a right to the best bargain which the two members of the committee of management, had they known the facts, would have been in a position, acting fairly and rightly, to give them. *Beck v. Kartorowicz*, 480

27. *Concealment of the fact of unprofitable working.*—Plaintiff had worked the coal under his estate, but abandoned it as unprofitable. Twenty years afterward the defendant cleared the pit, examined the coal in the shaft, with other persons, and subsequently contracted for a lease: *Held*, that he could not resist a specific performance on the ground of plaintiff not having communicated to him the fact of his having worked the mine and found it unprofitable. *Haywood v. Cope*, 499

28. *Liability for placing company on the Stock Exchange by false representations.*—Defendant, the chairman of a mining company, by falsely representing to the Stock Exchange that two thirds of the shares had been taken and paid upon, procured the stock to be entered on the official list. Plaintiff, a stranger, knowing the rule that such stock was not admitted unless these conditions were complied with, seeing the stock so entered and relying on the insertion having been procured by honest means, bought some shares from a jobber on the Exchange: *Held* (affirming the judgment of the Exchequer Chamber), that plaintiff had a right of action for the fraudulent representation. *Bagshaw v. Seymour*, 510

29. *Action against director fraudulently placing company on Stock Exchange.*—By rule of the Stock Exchange no mining company could be inserted in the official list unless its subscription list was full and not less than two thirds of its script paid up. Defendant, a director in a mining company, having falsely represented that these facts existed in the case of his company, it was quoted in the official list. The plaintiff, knowing the rule, bought on the Stock Exchange 200 shares. It was proved that less than one fifth of the shares were allotted, and less than one tenth ever paid. The shares turned out to be valueless: *Held*, that an action was maintainable by plaintiff against defendant for the fraudulent representations made by him. *Bedford v. Bagshaw*, 514

30. *Misrepresentations made for general circulation.*—A man may not be liable for the remote results of every untrue statement he may make; but he is liable for the consequences of a fraudulent misrepresentation intended to be generally circulated, to those persons who are injured by acting upon it. *Id.*

31. *Liability of director for fraudulent prospectus.*—An action will lie against a director of a mining company for false and fraudulent repre-

FRAUD. *Continued.*

sentations contained in a prospectus issued with his sanction, although the language might be susceptible of a meaning which would make it not literally untrue; and it is not necessary that the representations should have been made directly by the defendant to the plaintiff. It is enough that they are contained in a document which is meant to be circulated amongst the class of persons who are likely to be deceived by it. *Clarke v. Dickson*, 523

32. *Sole inducement.*—It is no defense to such an action that the false representations contained in the prospectus were not the sole inducement to the plaintiff to buy shares in the concern. *Id.*

33. *Custom not to pay, if mine fails.*—Defendant, in action on note for purchase money of a gold mine, offered evidence that the custom in California was that if the mine proved unproductive the note was given up: *Held*, that such custom must not only exist, but be known to parties at the time, or so public that knowledge would be inferred; 2, that such custom, if it existed, was "so unreasonable that it was probably enforced by the bowie knife." *Leonard v. Peebles*, 538

34. *Distinction between fraudulent and innocent misrepresentations.*—When one represents as a fact what he knows to be false, or asserts a thing to be so, not knowing whether it be true or not, and it turns out to be false, he is in both of these cases guilty of a moral as well as a legal fraud. But where one honestly believes the truth of what he affirms, he is not responsible for the mistake, unless the representations were of a character to amount to a warranty. *Id.*

35. *Joint buyer colluding with vendor—Silent conspirator.*—Parker, who was the owner of a soapstone quarry, conveyed a one third interest therein to Reding for the sole consideration of his procuring a purchaser for the remaining two thirds. Parker and Reding then both made statements to the plaintiff that the quarry was worth \$30,000; was a great bargain at \$15,000; with specific misrepresentations as to the produce of the quarry, but concealing Parker's position entirely, and that the only consideration for the whole mine was the price to be paid by plaintiff for the two thirds. Plaintiff purchased the two thirds for \$10,000, which was greatly above its value. A brother of Parker was also assisting him in the trade, knowing the conspiracy, receiving \$2,000 of the consideration money, but personally made no misrepresentations. In an action to recover the purchase money it was *held*, that there was sufficient evidence against the brother of Parker to justify the refusal of a nonsuit. *1'age v. Parker*, 544

36. *Items inducing value not matters of mere opinion.*—Statements going to the value of a mine as to quantity of ore on hand, and its proximity to wood and water for milling facilities, are not mere matters of opinion upon which a purchaser of stock has no right to rely. *Gifford v. Carvill*, 558

37. *Defense to purchase money note.*—Such representations, if fraudulent, on proper pleadings may be given in evidence to defeat notes given in consideration of stock purchased on such representations. *Id.*

38. *A reckless statement of the capacity of a mine put forth with a*

FRAUD. Continued.

view to influence persons to take shares, and not upon a fair and reasonable belief of its truth: *Held*, to amount to fraud. *Glamorganshire Co. v. Irvine*, 565

39. *Slight misrepresentations in connection with bogus organization.*—A mining corporation bargained, through two of its directors, for mineral land in Colorado, at \$120,000, and in payment gave checks, not drawn upon funds, which the seller at once returned, agreeing to accept stock instead, and one of the directors paid him \$5,000 in cash, and paid off incumbrances amounting to \$6,500. The certificates required by law, showing the amount of capital and the amount paid in were filed, stating the capital at \$500,000, in shares of five dollars each, of which \$400,000 had been paid in; 20,000 shares were reserved as working capital; and of the 30,000 shares allotted to the vendor, 23,000 were issued to secure the party who had advanced the cash payment, and the balance of the 100,000 shares was distributed without consideration. Shortly afterward the company was enjoined against doing business, for non-payment of a tax of \$300. The defendant director sold stock to plaintiff on general statements that they were going to work it; that it was one of the best properties in Colorado, etc. On learning of the injunction, plaintiff demanded rescission: *Held*, that the facts warranted a recovery, the representations being taken in connection with the character of the original organization. *Bradley v. Poole*, 581

40. *Vendee's knowledge of value.*—The statement by a vendee of stock that he did not suppose that its property was put in at the par of its shares, *held*, no such sufficient knowledge as to prevent rescission in a case where the material facts in proof showed a case of active fraud. *Id.*

41. *Fraud, a defense to action for calls.*—It is a good plea to an action by a company against a shareholder for calls that the defendant was induced to purchase his shares by the fraud of the plaintiff, that he had never recognized, since notice of the fraud, any rights or liabilities as such shareholder, nor received any benefit from his shares, and that within a reasonable time after notice of the fraud he had repudiated his shares and given due notice thereof. *Bwlch Y Plwm Co. v. Baynes*, 596

42. *Fraud makes contract voidable, not void.*—Proof of fraud or misrepresentation does not of itself render a contract void, but voidable only at the option of the innocent party, and he must show not only the right to rescind, but that the contract has been, in fact, rescinded. *Byard v. Holmes*, 599

43. *Essentials to materiality of misrepresentations.*—Representations, to be such as will entitle a party to recover on the ground of deceit, must not only be false, but must also be intended to deceive, and must have been the inducement to the party to part with his money. *McAleer v. McMurray*, 606

44. *Fraud existing, but unknown to plaintiff.*—To maintain an action for deceit on the ground of fraudulent misrepresentations it must be affirmatively shown that they came to the plaintiff's knowledge and were the inducing cause of his loss. *Id.*

45. *Misrepresentation of title.*—Babcock held a treasurer's deed, and

FRAUD. *Continued.*

represented to Case that he had examined the title and found all right, and that the title was good; Case saying that he would take Babcock's word for it, bought the land without examination: *Held*, that there was a relation of trust and confidence, and Babcock was bound to exhibit the truth as it existed. *Babcock v. Case*, 618

46. *Ignorance no defense to party assuming to have knowledge.*—Babcock's ignorance of the facts, he having undertaken to state them truly, would not redeem a falsehood in any material matter from being a fraud that would avoid the contract. *Id.*

47. *Deed intended to hinder creditors.*—A mining company being about to obtain judgment against one of its directors, he made conveyance of all his assets to a third party: *Held*, that the deed was intended to delay, hinder or defraud creditors; (2) that it was not necessary for the company to have a lien or charging order to induce the court to set it aside; (3) but that in the absence of such claim the court could merely set aside the conveyance without distributing the assets. *Reese River Co. v. Atwell*, 626

48. *Organizer making profit on purchase.*—Stevenson being in negotiation for oil land proposed to form a company, represented that the land could be bought for \$12,000, and induced Short to take and pay for a share in it at \$1,000. Stevenson bought the land for \$6,000: *Held*, that on these facts Short could recover the \$1,000 which he had paid. *Short v. Stevenson*, 629

49. *Good faith required between associates.*—If Stevenson had disclosed the sum for which the land could be bought, and which he paid, and refused to sell for less than at the rate of \$12,000, the transaction would have been unimpeachable; but good faith required that he should charge his associates no more for their respective shares than the amount which he paid for them. *Id.*

50. *Representations to stock buyers, as to original cost.*—If in order to get up a company they represented themselves as having acted for one to be formed, proposed to sell at the prices they had paid, and their purchases were taken and stockholders invested on these representations, it was a fraud on those interested to allow them to retain profits paid them by the company in ignorance of the sums advanced. If they had disclosed the exact sum paid for the land, and had refused to sell except at an advance which was paid them, they would have a right to retain the profits. *Simons v. Vulcan Co.*, 633

51. *Action, in form ex contractu, based on fraud.*—Where parties have so acted, an action in form *ex contractu* can be maintained only by showing fraud in dealing with the company, by reason of which they should not *ex æquo et bono*, retain the moneys wrongfully obtained from it. *Id.*

52. *Latitude of evidence.*—In investigations as to fraud great latitude of inquiry is always allowable. *Id.*

53. *"Original owner."*—A prospectus of an oil company stated that the company had purchased their land from the "original owner": *Held*, that this was not a term of art, to be explained by experts. The term implied that no profits were added to the price paid by the company on

FRAUD. *Continued.*

account of an intermediate buyer, etc., and excluded the idea of a purchase at speculative prices. *Id.*

54. *Directors making profit out of company.*—Agents, partners or associates can not make profit out of their principals, copartners or associates, for whom they have undertaken to act. Directors are but the agents of the company, and have power to act only for the interest of the company, not against it. *Id.*

55. *Essential requisites in action for deceit.*—To maintain an action on the case for deceit, the plaintiff must allege and prove—1. That the defendant made representation to plaintiff, meaning that plaintiff should act upon it. 2. That such representation was false to the knowledge of defendant when he made it, and 3. That the plaintiff believing such representation to be true, acted upon it, and was thereby injured. *Byard v. Holmes,* 657

56. *Relation between the fraud and the damage must appear.*—The declaration must show, not only what the fraud was by which the plaintiff has been injured, but also its connection with the alleged damage, so that it may appear judicially to the court that the fraud and the damage sustain to each other the relation of cause and effect, or at least that the one might have resulted directly from the other. *Id.*

57. *Purchase on letters without personal knowledge by either party.*—In an action on a note given for the purchase money of oil lands defendant averred fraud. It appeared that plaintiff himself had never seen the lands in question. That the only knowledge he had of them was by letters from his brother. That he showed these letters to defendant, and told him he had no knowledge of the land, but that his brother was a "trustworthy and reliable person" (which was not negatived). Defendant bought the land, telling plaintiff it was because of his confidence in him: *Held*, that if the letters were shown in good faith without concealment, and the plaintiff believed the writer entitled to confidence, and explained his want of personal knowledge, the facts were no defense to the note. *Cooper v. Lovering,* 662

58. *Attorney of successive adventurers seeking purchase, favoring one of them—Facts of the case.*—One Taylor informed Tatham of the existence of zinc in a certain valley. Tatham, Taylor, and Wilson, as Tatham's attorney, visited the valley to obtain mining leases. Among others they bargained for one from Waite, which was signed by him, but which his wife refused to sign, and it was therefore never delivered. Afterward, one Lewis, as a party proposing to buy out Taylor's interest in the adventure, accompanied Taylor and the attorney, Wilson, to the mineral region. This attorney concealed the existence of the lease from Lewis, nor did he inform Tatham of Lewis' intention to purchase. Lewis declined to buy out Taylor, but bought the Waite farm for himself, through Wilson as his attorney, in the benefit of which purchase Tatham now claimed to share: *Held*, that the lease referred to was void, having never been executed or delivered. 2. That as there was no confidential relation between Tatham, the plaintiff, and Lewis at the time of the purchase by Lewis, the defendant, Lewis was not bound by the knowledge which

FRAUD. *Continued.*

Wilson possessed as the attorney for Tatham. 3. That as the remedy at law was complete against the attorney, for his fraud or negligence, there could be no recovery against him in equity. *Tatham v. Lewis*,

670

59. *Second contract tainted by original fraud.*—A second contract, annulling a first contract, which had been made upon fraudulent misrepresentations, the second contract being made under the continuing influence of such misrepresentations, is not a condonation of the original fraud. *Davis v. Henry*,

680

60. *Salting the dump—Fraudulent samples.*—A contract of sale, induced by representations that vendor, in boring for oil, had, at the depth of 108 feet, struck a vein of asphaltum coal from seven to nine feet thick, and had also in such well a "show of oil," which representations were fortified by pieces of asphaltum coal, brought from elsewhere and scattered about the oil well, and by a bottle containing a "show of oil": *Held*, unconscionable and voidable until knowledge of the fraud, and ratification after such knowledge. *Id.*

61. *Misrepresentations, not operating to deceive, no defense.*—A misrepresentation, however fraudulent, can be of no avail as a defense unless it served to deceive the party at the time he became fixed by the treaty. If the party claiming to have been defrauded, before being tied and while in a situation to retreat without prejudice, in any manner becomes acquainted with the truth, the misrepresentation is no defense to the contract. *Whiting v. Hill*,

692

62. *Defects in salt-cell known, by test, to the vendee.*—Where, in defense to a bill foreclosing purchase money mortgage, damages were claimed on account of fraudulent misrepresentations at the time of the purchase of the salt property in question, in substance that the brine was of ninety degrees strength, free from gypsum and sufficient in quantity to supply three or more salt blocks; and the evidence showed that defendants, pending negotiations, were, for fifteen days after such representations were made and before they became bound to the purchase, in possession and steadily working the well; that they were familiar with the business of salt making and had themselves discovered that the brine contained gypsum and was deficient in strength and quantity, such misrepresentations, if made as alleged, would be no defense to the bill. *Id.*

See CONSIDERATION, CORPORATION, 2, 3; FORFEITURE, 1; MEASURE OF DAMAGES, 2; PLEADING AND PRACTICE, 10, 11; PROSPECTUS; RESCISSION; SPECIFIC PERFORMANCE, 4; TENANT IN COMMON; VOID AND VOIDABLE.

INJUNCTION—See FLOODING, 6, 7.

INSPECTION.

1. *Inspection, with excavations and allowance for expense of the same.*—The bill charged the making of subterranean excavations across defendants' bounds into plaintiffs' adjoining ore bed, and prayed an inspection. The court appointed viewers with power to employ engineers and workmen, enter defendants' ground and workings, and drain and clear the same so far as necessary to ascertain the amount of ore taken, and do

INSPECTION. *Continued.*

all acts reasonably necessary to ascertain the amount of mineral taken. The viewers actually obtained access to the trespassing drifts by a new excavation made from a shaft of plaintiffs' on plaintiffs' ground: *Held*, that if this were the cheaper mode of access, and reasonably necessary, it was within the terms of the order, and the expenses of the view, \$1,841.07, which had been advanced by plaintiffs, were allowed *with interest*. such sum including an allowance for the use of plaintiffs' shaft and machinery in making the excavations. *Stockbridge Co. v. Cone Iron Works*, 317

INSOLVENCY.

1. *Insolvency of vendee* is of itself no ground to rescind a contract. *Falls v. Carpenter*, 398

JUSTICE OF THE PEACE.

1. *Power of justices' courts*.—Justices' courts are not courts of record, do not proceed according to the course at common law, and are to be confined strictly to the authority given by statute without implications indulged in their favor. *Cox v. Grushong*, 210
See FORCIBLE ENTRY, 9.

LACHES.

1. *Landlord's wrong condoned by tenant's laches*.—Another having intruded into the possession, the lessee did not bring suit for two years and a half: *Held*, that this was an abandonment of the term, and obviated the necessity for a demand of rent and a formal declaration of forfeiture. *Kreutz v. McKnight*, 314

2. *Length of time, short of the Statute of Limitations*, is sometimes a bar, but not if fraud exists, or if the delay is accounted for. *Warner v. Daniels*, 436

See FORFEITURE, 15, 16; RESCISSION, 1, 6.

LEASE.

1. *Payment of rent*.—A lease required that the lessee should make sworn monthly returns of coal mined, and pay the rent monthly. There was no evidence of such returns, and evidence of only three payments of rent: *Held*, that the law concluded that no returns were made, and that other rent was not paid. *McKnight v. Kreutz*, 305

2. *The proper words to be used in creating a limitation* upon the term granted by a lease, are "while," "as long as," "until" and "during." *Vanatta v. Brewer*, 358

3. *Right of re-entry must be reserved*.—To create a good condition upon which the term granted by a lease shall end before lapse by expiration of time, a right to re-enter, on breach, must be reserved. *Id.*

4. *Wife refusing signature to lease*.—A lease of the husband's lands, but made in the name of husband and wife, for the purpose of barring her dower, which the wife refuses to sign, is an instrument which has never become binding on either party although already signed by both the lessee and the husband, and upon the wife's refusal to sign: *Held*, that the husband had a right to destroy it. *Tatham v. Lewis*, 671

LEASE. *Continued.*

5. *Destruction of lease.*—The destruction of a lease once delivered, does not destroy the estate or term. *Id.*

See EJECTMENT, 2; FAULT, 1; FIXTURES; FORCIBLE ENTRY, 10; FORFEITURE; FRAUD, 22; LACHES, 1; LIEN, 1-4; TRESPASS, 4.

LICENSE.

1. *License distinguished from easement.*—An easement can only be created by deed, but a license may exist in parol; a license creates no estate in the land. *Fuhr v. Dean,* 216

2. *Rerocation of license.*—A license can not be revoked so as to make the acts done under it a trespass, nor can it be revoked to the injury of the licensee without indemnity to the extent of such injury. *Id.*

LIEN.

1. *Mechanic's lien against lessee's interest.*—Although under the lease the lessee has the privilege of removing his machinery and fixtures, yet an engine and fixtures attached to the soil are a part of the estate until severed, and a material man or mechanic furnishing or erecting the same is entitled to a lien against the estate of the lessee therein. *Dobschuetz v. Holliday,* 106

2. *Surrender by lessee.*—A voluntary surrender by the lessee can not divest such a lien when once attached. *Id.*

3. *Purchaser becomes tenant.*—The owner of the fee neglecting to discharge the lien against the leasehold interest, in such a case would be compelled to accept another tenant. *Id.*

4. *Decree can not reach the fee.*—The decree against the leasehold interest can not be enlarged to reach beyond the leasehold interest including the tenant's improvements. *Id.*

LOCATION—See DESCRIPTION, 1; FRAUD, 23.

MANDAMUS.

1. *Existence of collateral remedies will not prevent mandamus.*—To supersede the award of mandamus a party must have not only a specific legal remedy, but one competent to afford speedy relief, and that possession which is the object of the action of forcible detainer; no action on the sheriff's bond, or criminal prosecution, or action on the case for breach of duty, will give such relief or prevent the ordering of a mandamus. *Fre. mont v. Crippen,* 221

See FORCIBLE ENTRY, 7.

MEASURE OF DAMAGES.

1. *Prevention of mining, a destruction of value.*—When claims are valuable for mining only, the interruption of their use for such purpose is to defeat the object of their original appropriation. *Logan v. Driscoll,* 172

2. *Fraudulent sale of quarry—Measure of damages.*—In an action for deceit and fraud in the sale of property, where the purchaser retains it, and where numerous misrepresentations in relation to the property, or in relation to several distinct particulars or qualities of the property, are found to have been made by the vendor, some of which may be material

MEASURE OF DAMAGES. *Continued.*

and others immaterial, some fraudulently and others honestly made, though all are false in fact, the rule of damages is the difference between the actual value of such property and its value as it would have been if it had been such as it was represented to be in those particulars concerning which the false and fraudulent representations were made. *Page v. Parker*, 545

3. *The price paid the basis of the measure of damages.*—In such case the price paid is strong, but not conclusive evidence of the value of the property as it was represented to be, whether such representations were fraudulently or honestly made, provided they were material. *Id.*

4. *Rule of damages in warranty cases, when applicable.*—The rule of damages in cases of warranty and in cases of fraud in the sale of property is the same, only when the warranty in the one case covers those qualities and properties of the article sold, and those only, concerning which the misrepresentations in the other case are material and fraudulent, as well as false. *Id.*

See TRESPASS, 5.

MISTAKE.

1. *Mistake*, in equity, may be shown affirmatively as by bill, or as a defense, and may be proved by parol testimony. *Loosevelt v. Dale*, 377
See FRAUD, 2, 18.

MORTGAGE.

1. *Fixtures feed the mortgage.*—Though such engine and boilers were put up after the mortgage to the plaintiff was given, they constituted parcel of the mortgage security and were not liable to removal by the mortgagor or her assigns, if such removal was injurious to the mortgagee, who has a right to benefit from any appreciation of the mortgaged premises arising from any cause. *Roberts v. Dauphin Bank*, 54

2. *Action on the case by mortgagee, for removal.*—Where the mortgagor is insolvent and a second mortgagee has been injured by the removal of the fixtures, he may maintain an action on the case against the parties removing the property. *Id.*

See FIXTURES, 16.

NONSUIT.

1. *Nonsuit; discretion of lower court.*—The refusal to grant a nonsuit is in the discretion of the trial court, and no exception lies to the denial of the motion; and if defendant proceed to offer evidence, it is a waiver of the motion. *Bradley v. Poole*, 581

NUISANCE—See TRESPASS, 2.

PARTIES.

1. *Where parties are numerous*, as in the case of a joint stock company composed of many shareholders, and it is impracticable to bring them all into court, a suit may be allowed by some of them on behalf of themselves and others, without requiring all persons interested to be made parties. *Von Schmidt v. Huntington*, 284

2. *Dissolution of association.*—A joint stock association formed for a

PARTIES. *Continued.*

definite period can not be voluntarily dissolved without unanimous consent; if such consent can not be had, application must be made to the court.

3. *Facts of the case.*—A joint stock association was formed in New York, called the New York Union Mining Company, for the purpose of mining in California, between the dates January 1, 1849, and October 1, 1853, with express prohibition of dissolution within one year after reaching California, except on certain contingencies, which had not occurred: *Held*, that a portion of the company could not, contrary to the articles, dissolve the association of their own motion, but as it was impracticable to keep the company together or carry out the original plan, the court decreed a dissolution and a division of the assets. *Id.*

4. *Distribution among money shares and labor shares.*—The holders of the money shares had contributed money and paid the transportation of the holders of the labor shares, who as yet had contributed no labor or other consideration: *Held*, that in such case the entire effects should be distributed to the holders of the money shares alone. *Id.*

5. *Necessary parties in chancery—Excuse for nonjoinder.*—In a bill involving the rights and interests of a corporation and its stockholders, it is essential that all persons in interest be made parties, or good reason shown for not making them parties. Such bill should show who are the present owners of shares, and contain averments showing it filed on their behalf as well as on behalf of complainants. Mere non-residence is no excuse for nonjoinder of a defendant; the averment as to unknown heirs in the complaint is also too general. *Westcott v. Minnesota Mining Co.*, 336

6. *Dismissal for defect of parties.*—Want of necessary parties is good ground for dismissing a bill on the hearing; and this will be done with less reluctance when the facts disclosed by the evidence fail to make out a strong case on the merits. *Id.*

7. *Demurrer for misjoinder.*—If a party misjoined as defendant do not complain, it is not for the other defendants to demur for such misjoinder. *Davis v. Henry*, 680

See ESCROW; FORFEITURE, 22; FRAUD, 7; SPECIFIC PERFORMANCE, 7.

PARTNERSHIP.

1. *Costs and counsel fees* allowed out of the fund, a dissolution being the interest of all the parties. *Von Schmidt v. Huntington*, 285

2. *Personal liability for over-issue of stock.*—Officers of a corporation guilty of an over-issue of stock are liable to those persons into whose hands the shares may come, the same as if they had been issued to the plaintiff directly. *Bruff v. Mali*, 574

3. *Shifting burden of proof.*—In such action to recover the cost of such spurious shares, when the plaintiff has proved that the shares in question were not issued until after all the authorized stock had been issued, the burden of proof is upon the defendants to show that the shares were genuine, or were issued in lieu of genuine canceled shares. *Id.*

PERSONAL LIABILITY—See PARTNERSHIP, 2.

PLEADING AND PRACTICE.

1. *Mingled averments of tort and contract.*—Where sufficient facts are stated to justify recovery, the confusion of matters of tort and contract in the statements of the complaint, will not prevent the pleading being sustained. *Prescott v. Wells, Fargo & Co.*, 89

2. *The allegation of the value of fixtures*, in suit for their conversion, is not essential. It is sufficient to allege the amount in which plaintiffs were damaged.

3. *Proof of value.*—The proof of the value of the fixtures is material in showing the amount of damages; and from the value the cost of removal would have to be deducted, and such cost could be shown on cross-examination. *Id.*

4. *Verbiage* and loose allegations do not vitiate a complaint where the facts stated are sufficient to sustain an action. *Weaver v. Conger*, 203

5. *General demurrer where one good count exists.*—When a general demurrer to a complaint is interposed, it will not be sustained where there is one good cause of action sufficiently stated. *Id.*

6. *Lis pendens.*—A plea of former suit pending between the same parties is not sustained by showing the existence of a suit where no summons had followed the complaint, and no appearance by the defendants. *Id.*

7. *Change of venue.*—When a cause has been removed from one justice to another, parties after proceeding to trial without objection can not, after trial, assert that it was not sent to the proper justice. *Cox v. Groshong*, 210

8. *Conciliation.*—The Mexican requirement of *conciliation* which was an endeavor through judicial officers to effect a settlement before process issued or formal litigation began, was in force in California before the conquest, and it seems would be the regular proceeding since; but by common consent it has been discarded as a useless formality. *Von Schmidt v. Huntington*, 284

9. *Test of declaration, after verdict.*—A declaration is good after verdict which shows a good cause of action, though defectively stated; otherwise, if it show no cause of action though correct in form. *Cornelius v. Molloy*, 456

10. *Choice of action by defrauded party.*—Where a party has paid money on a contract induced by fraudulent representations he may, (1) maintain an action for deceit against the person guilty of fraud; (2) he may waive the fraud and proceed for breach of the original contract; or (3), having legally rescinded the contract, he may recover in assumption whatever he has paid upon it. *Byard v. Holmes*, 598

11. *Form of pleading false pretenses.*—A mere general averment that the matter was a pretense and that plaintiff was deceived by it, is not sufficient either in criminal or civil cases; it can be done in no other way than by a distinct and specific averment of the falsehood of each separate matter of fact stated by the defendant, and intended to be denied by the plaintiff. *Byard v. Holmes*, 657

12. *Replication.*—All the allegations of an answer in chancery are to be taken as true where no replication has been filed, and the case is heard on bill and answer. *Von Schmidt v. Huntington*, 284

See EJECTMENT; ERROR; FORCIBLE ENTRY; FORFEITURE, 8; NON-SUIT; PARTIES.

POSSESSION.

1. *Staking boundaries as proof of possession*.—The mere evidence of staking boundaries is not proof of possession, but it is proof of the *extent of possession*; and in the absence of a complete transcript, the court will presume sufficient evidence of plaintiff's possession was given. *Boardman v. Thompson*, 240

See FORCIBLE ENTRY, 11; TRESPASS, 3.

PROSPECTING CONTRACT—See FORCIBLE ENTRY, 10.

PROSPECTUS.

1. *Board of directors*.—In an action by a company for calls, plea that the defendant was induced to become a holder of shares by means of the fraud of the plaintiffs: *Held*, that fraud of the directors as a board, and as a body, was fraud within the plea, and would avoid the contract. 2. That the publication by the directors of statements in their prospectus false in fact and calculated to mislead the public, if careless whether their statements were true or false, would amount to fraud. 3. That this would not the less be so merely because the prospectus referred to reports of surveyors which had in fact been received, and might have been referred to by the shareholders, if in point of fact they relied upon and were influenced by the prospectus. *Glamorganshire Co. v. Irvine*, 565

2. *Idem—Recklessness amounting to fraud*.—The publication by the directors of a prospectus prepared by the attorneys, the main promoters, without referring to the reports, or taking any pains to verify its statements, was evidence of such recklessness as would tend to show fraud within the above definition. *Id.*

See FRAUD, 29-32.

PUBLIC DOMAIN.

1. *Territorial sovereignty*.—The extent of power in a territorial legislature to regulate the primary disposal of the public lands, considered. *Territory v. Lee*, 248

See CLAIM; FORFEITURE, 2.

RAILROADS—See FIXTURES, 17, 21.

REPLEVIN.

1. *A writ of replevin is effectual for the delivery of personal property only*; it furnishes no justification to an officer who, under it, severs and delivers such engine and boilers, a part of the realty. *Roberts v. Dauphin Bank*, 54

RESCISSION.

1. *Facts allowing rescission after great lapse of time*.—Daniels purchased of Warner a farm worth \$6,000, paying him in stock of the Cleft Ledge Granite Company, which stock he represented to be worth the price of the farm. The quarry of the company had been bought for \$4,500, all or a part of it still unpaid, and secured by mortgage. Its purchaser had turned it over to the company at \$53,000, payable in the company's notes. It was in reality worthless. Defendant represented that it stood at par. The parties had met apparently by accident, but really upon a concerted scheme of defendants. The sale of the farm was induced by the fraudu-

RESCISSION. *Continued.*

lent statements of certain facts, and the concealment of other facts, by defendants. No steps were taken for relief for about four years, complainant not knowing that he had a remedy, but meanwhile neither the stock nor the farm had changed materially in value: *Held*, that the difference between the supposed and real value of the stock was not of itself sufficient to base rescission, but that the active fraud of defendants was sufficient for such purpose, and that to such fraud the delay in time was no bar. *Warner v. Daniels*, 436

2. *Practice on rescission where reconveyance is impracticable.*—When a mutual and complete rescission can not be had, equity will decree it *pro tanto*, and as to the balance allow damages. It will order a transfer of the property given as consideration on both sides, or from one side only, if the other can not be reached—with an account of damages. *Id.*

3. *Rescission essential before defense available.*—A party can not interpose such defense unless he has, before trial and promptly after discovering the fraud, offered to rescind and return all property received from the defrauding party, unless the property received be of no value whatever. *Gifford v. Carvill*, 553

4. *No tender necessary if stock absolutely without value.*—If the property have any value whatever to either party it must be returned, but if entirely worthless to both parties return would be a useless ceremony. *Id.*

5. *Plea of fraud and rescission.*—Defendant in suit on note given for stock sold on fraudulent representations should aver rescission, or else aver that the property received by him had absolutely no value. *Id.*

6. *Suit based on rescission.*—Where the suit presupposes rescission of the contract plaintiff must show that the contract on which the money was paid has ceased to exist. *Byard v. Holmes*, 599

7. *Partial rescission not allowed—Laches.*—A party seeking to rescind a contract must put the opposite party *in statu quo* so far as he is able to do it, and as soon as possible after discovery of the fraud. As long as he retains anything received under the contract, which he might have returned, there can be no rescission.

8. *Condition precedent.*—The rescission must be complete before action brought. *Id.*

9. *Reconveyance—When not necessary.*—B. & S. projected an oil company and induced M. to subscribe to the stock. The land on which it was based was afterward conveyed to the company by the vendor of B. & S. M. sued them to recover the money paid for his subscription, on the ground of their fraudulent misrepresentations. It was not necessary that M. should first tender a reconveyance of the land. The company not being incorporated, no estate passed by the conveyance, and M. had no interest, legal or equitable, in the land. *McCabe v. Burns*, 665

10. *Receipt need not be returned.*—B. & S. had given M. a receipt for his subscription, but no stock had been issued to him; he was not bound to tender the stock nor the receipt which was the evidence of his payment. *Id.*

See FRAUD; INSOLVENCY; STOCK.

RES ADJUDICATA—See EJECTMENT, 1.

SALINES—See FIXTURES, 4; FRAUD, 1, 62.

SHERIFF'S DEED.

1 *Recital of judgment in sheriff's deed.*—A constable's or sheriff's deed which fails to recite the judgment on which it issued, is void. *Wiseman v. McNulty*, 326

SPECIFIC PERFORMANCE.

1. *Specific performance as to mode of working.*—The matter of a lease, covenanting for the working of a series of underlying beds of coal, *held*, (*obiter*) not a matter for specific performance. *Abinger v. Ashton*, 1

2. *Facts of the case—Covenants as to working three successive underlying coal seams.*—Three seams of coal, one underlying another, were let at a fixed rent, under covenants that lessees should work and carry on the mines with their utmost skill and ability in the best and most effectual manner, to the best advantage and according to the common mode and usual practice of carrying on collieries with effect. Upon bill by the lessor alleging that defendants, after having for some time worked the three mines, had ceased working the *upper* mine, and also that they were working the *lower* in advance of the *middle* vein and praying injunctions accordingly: *Held*, that under the terms of the covenant defendants were entitled to work any of the mines without working all, or all that they had commenced to work; that under the evidence it was the common practice in the district to work a lower seam of coal before working a higher. *Id.*

3. *Sudden appreciation, after election made.*—Increase of value is not such a change in the subject-matter of a contract as is, of itself, a ground for rescission or to excuse non-enforcement; but if one of the parties refuse to perform, and *then comes a change of circumstances* upon the strength of which he is desirous to go on with the bargain, he may be properly repelled, although he was watching for that change. *Falls v. Carpenter*, 393

4. *Ignorance of lessee—Subsequent failure of mine.*—A person contracting for the lease of a mine can not resist a specific performance on the ground of his ignorance of mining matters and of the mine turning out worthless. *Haywood v. Cope*, 499

5. *Discretion defined—Inadequate consideration, no defense to specific performance.*—Specific performance is a matter of discretion to be exercised, however, according to fixed and settled rules, and the mere inadequacy of consideration is not a ground for exercising such discretion by refusing a specific performance. *Id.*

6. *Taking possession of the mine by intended lessee held* not to be an acceptance of the title. *Id.*

7. *Assignee of purchase money a proper party.*—On bill for specific performance, an assignee of parcel of the purchase money has an equitable interest, may be affected by the decree, and is a proper party defendant. *Davis v. Henry*, 680

See DESCRIPTION, 2; EVIDENCE, 1; FAULT, 2, 3; FRAUD.

STATUTE.

1. *Retroactive statu'e.*—A statute should be, as a rule, construed to operate only upon the future; but unless controlled by constitutional prohibition it is competent for a legislature to give to a statute a retroactive effect. *Von Schmidt v. Huntington*, 284

STATUTE OF LIMITATIONS.

1. *Underground and unknown trespasses.*—In the application of the Statute of Limitations, there is no distinction between trespasses underground and upon the surface; nor whether the action is known or unknown to the plaintiff within the time limited by the statute. *Williams v. Pomeroy Coal Co.*, 195
2. *Consequential damages barred.*—The bar to a recovery in an action for a trespass, includes all the consequences resulting from such trespass. *Id.*

See FLOODING, 10; FORCIBLE ENTRY, 19.

STOCK.

1. *Stock of value—Mine of no value.*—The finding that a mine or a mining corporation has no value does not necessarily and of itself imply that the shares of the company have no value; they may have other property or paid up capital on hand. *Gifford v. Carvill*, 558
- See CORPORATIONS.

TENDER.

1. *Tender of re-conveyance.*—As a general rule, where there is an executed contract to recover back the purchase money on the ground of a defect of title, an action can not be maintained without the tendering of a re-conveyance. Rescission on the ground of fraud, failure of consideration, etc., is a right in equity to a restoration of the consideration, and the party claiming the restoration must return the property attained or re-convey the title. *Babcock v. Case*, 619
2. *No tender required of worthless consideration.*—If the thing, the consideration of which is sought to be recovered back, be entirely worthless, there is no duty to return it. *Id.*
3. *Pennsylvania practice—Tender after trial.*—A condition in the verdict to re-convey would do equity. After verdict, if it appear that a re-conveyance ought to be made, the court can restrain execution until it be made. *Id.*

See RESCISSION; STOCK.

TENANT IN COMMON.

1. *Purchase by one of several joint bidders.*—Although parties may have negotiated jointly for a purchase; yet if there has existed no confidential relation between them the purchase by one of them for his own benefit can not be set aside. *Tatham v. Lewis*, 60

TIME.

1. *Time is not of the essence* of an executory contract for purchase of land where the delay has been acquiesced in and the vendee allowed to continue in possession, although sudden and immense value has accrued to the premises by discovery of gold thereon. *Falls v. Carpenter*, 397

TORT—See PLEADING AND PRACTICE, 1.

TRESPASS.

1. *The purchaser of lands can not recover for antecedent trespasses.*
Williams v. Pomeroy Coal Co., 195

2. *Trespass distinguished from nuisance.*—The cause of action against a trespasser where the ultimate injury is a flooding chargeable to the trespass, is still the original trespass, and he is not answerable as for creating and maintaining a nuisance. *Id.*

3. *Possession to maintain trespass.*—Naked possession will sustain trespass against a wrongdoer, but will not prevail against a party having title and right of entry. *Fuhr v. Dean*, 216

4. *Damages, lessor against trespasser.*—Lessor may recover for ore taken from demised premises by a trespasser, at least to the extent of the royalty he should have received from the lessee. *Stockbridge Iron Co. v. Cone Iron Works*, 317

5. *The measure of damages* is the value of the ore as it lay in the bed, and not its value as increased by defendant's moving it; also the "damage done the real estate" (surface). *Id.*

See AGENT, 1; FLOODING, 10; STATUTE OF LIMITATIONS.

TRUST—See FRAUD, 5.

VENDOR AND PURCHASER.

1. *Acquiescence in default of vendee.*—A vendee contracted for the purchase of land and took possession, but neglected to pay the purchase money. Vendor acquiesced in the delay by keeping the purchase money bonds, and otherwise: *Held*, that having allowed the contract to subsist after default, the vendor could not put an end to it without formal and reasonable notice to the vendee to come forward and fulfill. *Falls v. Carpenter*, 397

2. *Purchase by third party, in interim.*—Such purchaser may, upon tender before notice as aforesaid, demand specific performance from the vendor or call for the legal title from a third party purchasing with full knowledge of the contract. *Id.*

See FIXTURES, 24, 25; FRAUD; TIME.

VENTILATION.

1. *Working as affected by the safety statutes.*—The court ought not to interfere to enforce a working where such action must be in disregard of the statutes relating to ventilation and the safety of the deep miners. *Abinger v. Ashton*, 1

VOID AND VOIDABLE.

1. *A contract induced by fraud is not void*, but voidable upon knowledge and election; and the proof as to vendee's knowledge of the fraud and his election to ratify or avoid being vague, the same was remanded for further testimony. *Davis v. Henry*, 680

See FRAUD, 42.

WATER—See FLOODING.

WITNESS.

1. *Interested witness.*—Defendant liable to decree can not, by releasing to his co-defendants *pendente lite*, become a competent witness for them. *Falls v. Carpenter*, 397



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